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Supreme Court of the United States

October Term, 1970.

No. 1084 70-392

HYMAN-MICHAELS COMPANY and
LAKES SHIPPING & TRADING COMPANY,
Petitioners,

v.

NATIONAL CARGO BUREAU, INC.,
Respondent.

No.

HYMAN-MICHAELS COMPANY,
Petitioner,

v.

NATIONAL CARGO BUREAU, INC.,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRITS	10
I. Is a Party Who Has Made a Fair and Reasonable Settlement of His Potential Liability, Who Bases His Claim for Indemnity Upon the Legally Determined Breach of the Indemnitor's Undertaking, Who Has Given Notice to His Indemnitor of the Claim Against Him, and Has Joined the Indemnitor as a Third-Party Defendant Under F. R. C. P. 14, Nevertheless Required in His Indemnity Action to Prove That He Was Actually Liable Upon the Original Claim Because He Did Not Formally Tender the Settlement to the Indemnitor?	10
II. Does a Court of Appeals, Having Found That the District Court Applied an Incorrect Standard to Reach Its Result (a Tort Standard of Superseding Cause as Opposed to the Contract Standard of Foreseeability of Harm) Have the Right to Substitute Its Own Independent Finding That the Damage Was Not Foreseeable When the Very Writings Evidencing the Contract Show That the Prevention of Fire (Cause of the Harm) Was the "Third Function of the National Cargo Bureau?"	17
CONCLUSION	22
APPENDIX:	
Court of Appeals Opinion, 2/5/71	1aa
Court of Appeals Opinion, 2/10/69	14aa
Court of Appeals Order, 3/18/71	26aa
District Court Opinion, 9/4/69	27aa
District Court Oral Opinion	66aa
Excerpt From Brief in U. S. Court of Appeals for the Sixth Circuit	83aa

CASES CITED.

Page

California Stevedore and Ballast Co. v. Pan-Atlantic Steamship Corp., 291 F. 2d 252 (CA 9, 1961) 11

Chicago v. Robbins, 67 U. S. 418 16

Chicago, R. I. and P. R. Co. v. Dobry Flour Mills, 211 F. 2d 785 (CA 10, 1954), cert. denied, 348 U. S. 832 12

Crumady v. The J. H. Fisser, 358 U. S. 423 10

Damanti v. A/S Inger, 314 F. 2d 395 (C. A. 2, 1963), cert. denied, 375 U. S. 834 10

Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U. S. 605 20

Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Company, Inc., — F. 2d —, CA 3, June 3, 1971 .....12, 22

Jennings v. U. S., 374 F. 2d 983 (CA 4, 1967) 13

McAllister v. U. S., 348 U. S. 19 .....20, 21

Moses-Ecco Co. v. Roscoe-Ajax Corp., 320 F. 2d 685 (1963) 17

New England Mutual Insurance Co. v. Dunham, 78 U. S. 1 .. 10

Rederi A/B Dalen v. Maher, 303 F. 2d 565 (C. A. 4, 1962) 16

Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124 10

St. Louis Dressed Beef Co. v. Maryland Casualty Co., 201 U. S. 173 .....13, 14, 15

The Toledo, 122 F. 2d 255 (CA 2, 1941), cert. denied, 374 U. S. 689 13

Waterman S. S. Corp. v. Dugan & McNamara, Inc., 364 U. S. 421 .....10, 16

West Coast Terminals Co. of California v. Luckenbach SS. Co., 349 F. 2d 568 (CA 9, 1965) 11

STATUTES AND RULES CITED.

	Page
46 C. F. R. 146.02-6(a)	5
46 C. F. R. 146.02-6(b)	5
46 C. F. R. 146.27-100	5
F. R. C. P. 14	3, 16, 17, 22
F. R. C. P. 52(a)	20, 21
28 U. S. C. A. 1254(1)	2
28 U. S. C. A. 1292(b)	8
28 U. S. C. A. 1332(a)2 and 1333(1)	7

IN THE

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petition of Hyman-Michaels Company and its wholly-owned subsidiary, Lakes Shipping & Trading Company (hereinafter "Hyman-Michaels" or "Petitioner"), respectfully prays that this Honorable Court may grant Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit to review two decisions and the final judgments of that Court in the two cases captioned above.

The first decision, upon an interlocutory appeal, reported 406 F. 2d 1039, was decided during the pendency of the litigation and prior to final judgment in the District Court. The decision of the Court of Appeals on appeal from the final judgment of the District Court was filed February 5, 1971. A timely petition for rehearing was denied March 18, 1971.

OPINIONS BELOW.

The first relevant opinion below was delivered orally by the District Court, prior to the interlocutory appeal. It is unreported, but appears 66aa.[1] The decision of the Court of Appeals on the interlocutory appeal is reported 406 F. 2d 1039 under the caption *Tankrederiet Gefion A/S v. Hyman-Michaels Company,* 14aa herein. The decision of the District Court is reported under the caption *Skibs A/S Gylfe, et al. v. Hyman-Michaels Company v. National Cargo Bureau, Inc.,* 304 F. Supp. 1204, 27aa herein. The decision of the Court of Appeals on appeals from the final judgments entered in the District Court is reported 438 F. 2d 803, herein 1aa.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit, affirming the judgment in favor of the respondent in both cases and entering judgments against the Petitioner in both cases, was entered February 5, 1971.

Pursuant to the rules of the Court of Appeals for the Sixth Circuit, a Petition for Rehearing was timely filed and was denied March 18, 1971 [26aa].

Jurisdiction to hear and consider the within Petitions is conferred upon this Court by 28 U. S. C. A. 1254(1).

1. The Appendix to this Petition containing the opinions below is referred to "aa" to contrast it with the record as prepared for the court below which is paginated with the suffix "a".

QUESTIONS PRESENTED.

I. In a Federal Court action where P sues D1 and D1 joins D2 as third-party defendant under F. R. C. P. 14, claiming D1 had hired D2 to perform certain tasks which had not been performed properly and P's loss resulted therefrom, Motions to Dismiss at the close of P's evidence were denied. Later, during the course of the trial, D2 was asked to participate in a settlement with plaintiffs to which all defendants would contribute in amounts to be negotiated. It refused to participate. Thereafter, D1 settles with P.

When D1 continues to prosecute its third-party claim for indemnity against D2 in the same proceeding, does D1 have the burden of proving, *inter alia,* that:

(a) it was actually liable to P; or

(b) that it was reasonable and prudent for D1 to have settled and that the amount paid in settlement was reasonable?

The court below imposed the burden of proving actual liability—(a) above.

II. At trial, the District Court found that D2 had breached its contractual undertaking with D1. However, it refused to impose liability upon D2 upon the ground that, under principles of *tort* law, the act of a third party had constituted an independent intervening cause of the loss which ensued, and held that this act of a third party, the ship's captain, "broke the previously existing chain of causation," [59aa, 304 F. Supp. at 1220].

Did not the Court of Appeals err in substituting its own independent finding that the act of the ship's captain,

in applying water to the combustible cargo of turnings [2] met the *contract* standard—"made the damage to the ship unforeseeable" [6aa, F. N. 1, 438 F. 2d 805 at 806] when the evidence in the record clearly showed and the District Court in its Opinion demonstrated that one of the letter exhibits evidencing the contract stated that:

> "The third function of [respondent] . . . will be to see that the cargo complies with the fire and safety regulations . . . the principal danger is that of overheating and fire . . ." [38aa, 304 F. Supp. at 1210].

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2. The evidence at trial was undisputed that the heating characteristic of metal turnings is the result of oxidation or rusting. Water accelerates and aggravates this characteristic, and is contraindicated.

STATEMENT OF THE CASE.

Petitioner, Hyman-Michaels (D-1), purchased a quantity of steel turnings from a recognized supplier. Turnings, the residue of lathe operations, are saturated with combustible lubricating and cutting oils. They are classified as hazardous cargo because they are "subject to heating and spontaneous ignition" [46 C. F. R. 146.27-100 (p. 782 of Revision of January 1, 1969)]. Hyman-Michaels sold the turnings to Mitsubishi, a giant Japanese conglomerate, and the terms of that contract were such that the price included the cost of shipment to Japan. To effectuate that portion of its sales contract, Hyman entered into a voyage charter for the M/V GYDA through its subsidiary, Lakes Shipping and Trading. (For our purposes, the distinction between the two is irrelevant.) The contract under which Hyman purchased the turnings required its vendor to see to the loading. The purchase price required that vendor "load, stow and trim" the cargo of turnings [30aa, Opinion, 304 F. Supp. at 1206].

Hyman engaged National Cargo Bureau (hereinafter "NCB" or "respondent") to render certain services in connection with the shipment [31aa, 304 F. Supp. at 1207]. NCB is a recognized expert in its field. It is the sole authority authorized to "assist the Coast Guard in the administering of the provision of the Dangerous Cargo Act" [R393a] [46 C. F. R. 146.02-6(a)] and its certificates of loading are accepted as prima facie evidence of compliance with the Act [R393a] [46 C. F. R. 146.02-6(b)]. NCB's relationship with Hyman-Michaels was a direct contractual relationship, partly oral and partly in writing.

The cargo of turnings was to be loaded at the Lake Michigan port of Muskegon. From Muskegon, the GYDA was to proceed eastward and pick up other cargo to be loaded in other holds of the vessel at Detroit. She was then

to proceed north and east through the St. Lawrence Seaway and thence to Philadelphia, her third and last loading port before her voyage to Japan. During the loading of the cargo at Muskegon, it began to heat. The NCB surveyor, appointed to supervise loading at Muskegon, had been called away on other work and was there only at the beginning of loading and after loading had been completed, just before sailing. Temperatures in the turnings aboard ship were already quite high, and well in excess of the 130° referred to in the Coast Guard regulations.

By the time the ship arrived at Detroit where it was to pick up other cargo, the temperature of the turnings was still quite high. Whereas on sailing from Muskegon on June 18, the high temperatures recorded in the various compartments into which turnings had been loaded ranged between 203° F. in the number three hold to 156° F. in the starboard deep tank [R424a], the high temperatures in the holds on arrival at Detroit ranged between 198° F. and 192° F. [R424a]. After the loading of another commodity into other holds of the vessel at Detroit, the vessel waited in the Detroit river for nine days before sailing because of the elevated temperatures. By the time she arrived at Montreal, smoke was coming from her hatches [35aa, 304 F. Supp. at 1208] and when the turnings were disturbed, admitting air, there was a small fire which was, however, quickly extinguished [35aa, 304 F. Supp. 1209]. Montreal was an unscheduled stop, made only because of the clear evidence of combustion in the holds. Damage to the ship had already occurred [35aa, 304 F. Supp. at 1209]. At Montreal, the decision was made to apply water to extinguish the fire which had ignited the wooden sheathing which lined the holds in which the turnings had been stowed. Water was more or less consistently applied between Montreal and Philadelphia.

In Philadelphia, there was no evidence of fire at arrival. The high temperatures in Holds 2, 3 and 4 (into which the turnings were loaded) showed 170° F., 210° F., and 200° F. When, after a period of waiting in Philadelphia, it was determined that the ship could not continue its voyage because of the high temperature in the turnings, unloading was commenced. It was during this unloading, when the grab bucket disturbed the cargo and permitted the entry of air, that there was spontaneous ignition of the fumes from the oils. Fire followed, and the holds of the ship were flooded to extinguish it. The ship had sustained damage by the time it arrived at Montreal. Further damage ensued before the entire cargo was unloaded. The discharged cargo of turnings was practically worthless.

After that, multiple litigation followed in the Eastern District of Pennsylvania, the Western District of Michigan, and the Eastern District of Michigan. Detroit, in the Eastern District of Michigan, was the final forum for litigation.

The Norwegian ship owner filed numerous suits, including one against Hyman-Michaels. The Japanese underwriters, who had insured the cargo for the ocean voyage, instituted suit against Hyman-Michaels. Federal court jurisdiction of both actions was properly based upon 28 U. S. C. A. 1332(a)2 and 1333(1). Hyman-Michaels joined NCB as a third-party defendant, claiming indemnity for failure of NCB to carry out properly the latter's contractual undertaking. These multiple cases, one with jury trial, the remainder non-jury, resulted in protracted litigation, principally because of the numerous parties.

During the course of the trial, the inevitable question of settlement arose. Hyman-Michaels, its vendor, Michigan Foundry Supply and the stevedore, Erickson Trucking, as well as National Cargo Bureau were all exposed to liability. There was one suit against NCB as an original defendant.

The amounts at stake were substantial. Some of the parties were covered by insurance as to some of the claims, others not. The question of reaching an agreement among the four parties exposed to liability, Hyman-Michaels, Michigan Foundry, Erickson Trucking and NCB, was discussed extensively among those four parties through their counsel during the trial. Some of those discussions were attended by representatives of underwriters and by officers of some of the parties involved. NCB refused to make any contribution whatever toward any settlement upon any terms.

Settlement discussions nevertheless continued. The trial judge participated in many of them and was kept advised of developments along the settlement line. Eventually, during the presentation of defense evidence and after denial of dismissal motions at the close of plaintiffs' evidence, agreements to settle were reached with the shipowner-plaintiff and the cargo-insurer plaintiff. All parties defendant except NCB made contributions to the settlements under appropriate agreements. The settling defendants reserved their right to proceed with the trial of their claims for indemnity against NCB.

At that point, the trial judge ruled that it would be incumbent upon Hyman-Michaels in its claim for indemnification against NCB to show that it had been actually liable to the plaintiffs, the shipowner, and the cargo insurer. His oral decision is reproduced 66aa.

The district judge then made the certification contemplated by 28 U. S. C. A. 1292(b) and the Court of Appeals for the Sixth Circuit accepted and heard the appeal. Its decision is reported 406 F. 2d 1039 and appears 14aa.

The trial, which had been interrupted for the hearing on appeal, was resumed. In accordance with its decision and that of the Court of Appeals, the District Court refused to permit evidence to be received that the settlement itself

was reasonable and prudent under all of the circumstances and that the amount paid was reasonable.

The jury returned a verdict in favor of the respondent, National Cargo Bureau, in that case. The trial judge filed an opinion, holding that NCB (respondent) had breached its undertaking with Hyman-Michaels but applied principles of tort law and found that there had been an independent intervening cause.

On appeal to the Court of Appeals for the Sixth Circuit from the final judgment, petitioner reasserted error in that court's earlier ruling with respect to the burden of proof imposed upon it in its indemnity claim. The court nevertheless reaffirmed its earlier decision.

Upon the appeal, petitioner also argued that the District Court had erred in applying tort principles of "superseding cause" to an action for indemnity based upon a contract where the court had already found that the respondent had breached its contract. By its "independent intervening cause" holding, the District Judge had exonerated NCB in the indemnity action.

The Court of Appeals noted that "this mistake might rise to the level of reversible error", but it substituted its own new finding and affirmed.

A Petition for Rehearing was timely filed and denied.

REASONS FOR GRANTING THE WRITS.

I.

Is a Party Who Has Made a Fair and Reasonable Settlement of His Potential Liability, Who Bases His Claim for Indemnity Upon the Legally Determined Breach of the Indemnitor's Undertaking, Who Has Given Notice to His Indemnitor of the Claim Against Him, and Has Joined the Indemnitor as a Third-Party Defendant Under F. R. C. P. 14, Nevertheless Required in His Indemnity Action to Prove That He Was Actually Liable Upon the Original Claim Because He Did Not Formally Tender the Settlement to the Indemnitor?

The various Courts of Appeal are at hopeless odds as to the requirements which must be met by an indemnitor proceeding on a theory of indemnity based upon a contract. Particularly so is this true where the contract is implied as, for example, in this Court's decisions in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124; *Crumady v. The J. H. Fisser*, 358 U. S. 423; and *Waterman S. S. Corp. v. Dugan & McNamara, Inc.*, 364 U. S. 421.

Just as the contracts implied in those cases were maritime contracts, so is the one upon which the Petitioner in this case proceeded. It was based upon a contract between petitioner and respondent which dealt with the loading and stowage of cargo aboard a vessel. It was a maritime contract. The subject matter was maritime, the contract was maritime; *New England Mutual Insurance Co. v. Dunham*, 78 U. S. 1.

In the Second Circuit, the indemnitee need not establish its actual liability. In *Damanti v. A/S Inger*, 314 F. 2d 395 (C. A. 2, 1963), cert. denied, 375 U. S. 834, the Court said:

> "The ship need not establish that it was in fact liable to the claimant so long as the claimant's injury on the ship and a potential liability on the facts known to the ship are shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the ship."

In the Ninth Circuit, the Court was considering the typical maritime injury case, in which the seaman had sued the shipowner in a Federal Court in New York. The shipowner settled and then brought an action in California against the stevedore alleging improper performance of its stevedoring contract as the cause of the condition which gave rise to the seaman's claim against it. The Court of Appeals for the Ninth Circuit pointed out that there were two issues for adjudication.

> "Was the settlement made reasonably and in good faith;"

and

> "Was there a breach of the indemnity contract by the stevedore which proximately caused the seaman's injury."

West Coast Terminals Co. of California v. Luckenbach SS. Co., 349 F. 2d 568 at 570 (CA 9, 1965).

California Stevedore and Ballast Co. v. Pan-Atlantic Steamship Corp., 291 F. 2d 252 (CA 9, 1961) is another similar case where that Court held:

> "Having established such potential liability, appellee need establish further only that Yerba Buena Corporation's [employer of the original plaintiff], negligent conduct *contributed* to Sannella's injury." 291 F. 2d 252 at 254. (Underscoring ours.)

The Tenth Circuit has said it this way:

> "Ordinarily, to sustain a claim upon an indemnity contract such as we have here, it is necessary for the indemnitee to prove legal liability to the injured party (citations omitted). However, in Oklahoma and elsewhere in indemnity cases, where the indemnitor denies liability under the indemnity contract and refuses to assume the defense of the client, then the indemnitee is in full charge of the matter and may make a good faith settlement without assuming the risk of being able to prove absolute legal liability or the actual amount of the damage." *Chicago, R. I. and P. R. Co. v. Dobry Flour Mills,* 211 F. 2d 785 (CA 10, 1954), cert. denied 348 U. S. 832.

In a recent and as yet unreported decision, the Court of Appeals for the Third Circuit stated:

> "We do not quarrel so much with the rule enunciated in the cases relied upon by the District Court so much as we perceive extreme difficulty in its practical application. The rule calls for an exquisite ability to predict, at a pretrial stage, the eventual outcome of the indemnity action. For the rule to apply, the prospective indemnitor must be in actual or constructive possession of facts which unerringly point to liability. If nothing else, even a cursory perusal of the cases discussed herein will indicate that the duty to idenmnify is an evanescent and often desultory doctrine which has divided courts hearing these actions at every level of the federal bench (footnote omitted)." *Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Company, Inc.,* F. 2d , CA 3, June 3, 1971.

The Court of Appeals in our case cited and relied largely upon the decision of the Second Circuit in *The*

Toledo, 122 F. 2d 255 (CA 2, 1941), cert. denied 314 U. S. 689, where that Court had said:

> "A claim for indemnity, however, requires that an actual liability be sustained by the indemnitee, and if he settles the claim without a determination of the rights in question, he bears the risk of proving an actual liability in the action over for indemnity." 122 F. 2d 255 at 257.

But it is clear that that statement is correct in some circumstances and not in others. It is correct where there has not been notice afforded the indemnitor and an opportunity to defend, but no modern case applies that rule where the indemnitor has been joined as a party in the action and participates actively in the trial of the case. It is the correct rule where the indemnitor has not been informed of the claim, has not had an opportunity to participate in the defense of it and where his first notice is after the settlement, when a suit for indemnity is brought against him. That was the situation before the Court of Appeals for the Fourth Circuit in *Jennings v. U. S.*, 374 F. 2d 983 (CA 4, 1967). We subscribe to the reasoning of Judge Sobeloff's decision in Jennings. The differing results in Jennings and those for which we contend are that in Jennings the indemnitor did not have notice of the claim nor an opportunity to defend. In the case at bar, the respondent was joined as a third party defendant by the petitioner on an indemnity claim, the thrust of the petitioner's claim was abundantly clear and was so stated during the trial. It is totally unrealistic to cite Jennings in support of the situation which existed in the case at bar.

That the petitioner concluded litigation against it by settlement and did not let the case proceed to a probable judgment against it does not change its legal right to recover indemnity if this Court's decision in *St. Louis Dressed*

Beef Co. v. Maryland Casualty Co., 201 U. S. 173 still stands. There, speaking for this Court, Holmes, J. said:

> "We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise, no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion. *But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution.*" (emphasis ours)

Clarification by this Court is urgently needed. The Court below, recognizing that in fact the respondent, by its participation in the trial, had all of the notice anyone could possibly give it, seems to be attempting to write another condition which will be demonstrably self-impeding so far as settlement of cases pending in federal courts is concerned. The Court is clearly saying [24aa] that when D1 wishes to settle with P yet pursue his indemnity claim against D2, D1 must reach a settlement agreement with P and then tender the settlement agreement to D2. If D2 is willing to enter into a hold-harmless agreement, then P must continue to prosecute his action and he has no settlement. Thus, it is only where D2 refuses to enter into the hold-harmless agreement that P and D1 have settled their litigation.

It is clear that under the procedure outlined by the Court below, P would never enter into a settlement agreement with D1 because that agreement would necessarily be contingent upon the refusal of D2 to enter into the hold-harmless agreement. If D2 executes the hold-harmless agreement, D2 would necessarily have to be free to continue contesting P's claim, for as the Court of Appeals puts it, D2 has ". . . the choice of approving the settlement or

going forward with the defense . . ." 24aa, 406 F. 2d at 1043.

No plaintiff would be interested in stating the amount for which he *really* would be willing to discontinue his action when he knows that at the conclusion of negotiations with his adversary, he may or may not have a settlement, depending upon whether or not D2 elects to approve or defend against P's claim against D1. A greater impediment to settlement would be hard to fashion.

It is an unvarying fact that sometime during the course of every trial, the question of settlement arises. Every trial judge raises it; all but a few participate, many even where the trial is without a jury. The impediment to expeditious trial which the procedure outlined (for the first time) by the court below imposes is obvious. We respectfully suggest that the federal third-party practice will be seriously circumscribed by the procedure now made necessary by the decision below. The concept that "a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution"[3] will be read out of the law, and the only safe and practical course in a case of contract indemnity will be to permit the case to go to judgment.

As early as 1863, this Court said:

> "An express notice to him to defend the suit was not necessary in order to charge his liability. Barney v. Dewey, 13 Johns. 226; Warner v. McGary, 4 Vt. 507; Beers v. Pinney, 12 Wend. 309.
>
> "He knew that the case was in court; was told of the day of trial; was applied to to assist in procuring testimony; and wrote to a witness, and is as much chargeable with notice as if he had been directly told

3. *St. Louis Dressed Beef Co. v. Maryland Casualty Co.*, 201 U. S. 173, *supra.*

that he could contest Woodbury's right to recover, and that the city would look to him for indemnity." *Chicago v. Robbins,* 67 U. S. 418.

The petitioner urges that the sum paid by it in settlement was paid under the compulsion of the litigation in which it was engaged with the respondent as another party. By joining the respondent as a third-party defendant, respondent was upon notice that it could contest the liability of the petitioner to the plaintiffs [F. R. C. P. 14], and it was surely upon notice that the petitioner would look to it for indemnity. We find it impossible to distinguish the situation in our case from this Court's decision in *Waterman Steamship Co. v. Dugan & McNamara, Inc.,* 364 U. S. 421. There, P had sued D1, who joined D2 by way of Third-Party Complaint. D1 and P settled and the trial was on the Third-Party Complaint, seeking indemnity. The issue before this Court, which reversed the judgment below, was upon the question of a "direct contractual relationship between the ship owner and the stevedore," 364 U. S. at 423. This Court nevertheless sanctioned the indemnity claim, although the settlement was never "tendered" to the respondent there. See the discussion of this Court's holding in *Waterman etc. v. Dugan etc.* in *Rederi A/B Dalen v. Maher,* 303 F. 2d 565 (C. A. 4, 1962), where that court held:

> "We hold that the District Court erred in treating an adjudication of liability as a basic prerequisite to the ship owner's claim of indemnity (footnote omitted). If the shipowner can show that the stevedore's breach of warranty has occasioned it expense, reimbursement is due. Of course, the ship owner must prove that the stevedore, in fact, breached its warranty and caused injury for which the ship owner was potentially liable and that the expenses incurred in defense are reasonable." 303 F. 2d 565 at 567.

See also the holding of the Court of Appeals for the District of Columbia Circuit in *Moses-Ecco Co. v. Roscoe-Ajax Corp.*, 320 F. 2d 685 (1963) and particularly the holding at p. 689, where that court holds that a "contract right to indemnification" is not lost by a settlement of the plaintiff's claim, and that the issue in the indemnification action was whether the indemnitee "was reasonable and prudent in settling, not whether it had been negligent and was therefore legally liable to plaintiffs."

The question of the rights of the parties under F. R. C. P. 14, where there has been a settlement as opposed to a judgment, is important. It is important substantively to the parties and even more so to the proper administration of federal third-party practice. The courts below are not in accord. One Court of Appeals has now written an entirely new condition into what had heretofore been accepted law, given, of course, notice and the opportunity to defend. The point needs clarification.

II.

Does a Court of Appeals, Having Found That the District Court Applied an Incorrect Standard to Reach Its Result (a Tort Standard of Superseding Cause as Opposed to the Contract Standard of Foreseeability of Harm) Have the Right to Substitute Its Own Independent Finding That the Damage Was Not Foreseeable When the Very Writings Evidencing the Contract Show That the Prevention of Fire (Cause of the Harm) Was the "Third Function of the National Cargo Bureau?" [4]

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4. The opinion of the District Court quotes McDonald exhibit 3 at 38aa, 304 F. Supp. at 1210, reading:

"3. The third function of the National Cargo Bureau with reference to this loading will be to see that the cargo complies with the fire and safety regulations of the U. S. Coast Guard and the U. S. statutes. The Bureau will issue its 'A Certificate' if

In reviewing the final judgment of the District Court, the Court of Appeals makes it abundantly clear that the District Court "erroneously interchanged language used in contract law with terms used in tort-negligence law," 5aa, 438 F. 2d 803 at 805, F. N. 1. It next accuses the parties of "themselves contributed to the error by incorrectly interchanging terminology in their pleadings and at trial" (id.). It then states:

> "Under ordinary circumstances, this mistake might rise to the level of reversible error, since contract principles correctly applied impose different standards of proof than negligence principles." [6aa, 438 F. 2d at 806].

It then goes on to state in a sort of inventive fashion that the District Court's findings of fact also support the conclusion that ". . . the breach of contract did not make [respondent] liable because remoteness in space and time . . . made the damage to the ship unforeseeable," [6aa, 438 F. 2d at 806].

At no place did the District Court make any finding of unforeseeability and its very Opinion, quoting from the exhibit just referred to, shows the District Court was well aware that the prevention of fire was one of the reasons Hyman-Michaels engaged the expert services of NCB.

The Court of Appeals did not disturb the District Court's finding that "NCB was in breach of its contract with Hyman-Michaels Company in several respects." [47aa]. It substituted, however, its own mixed finding of law and fact that "the injury to the ship and its cargo was unforeseeable," 11aa, 438 F. 2d at 808. This was material error

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there is compliance. *As you know, the principal danger is that of overheating and fire, and we hope this will be prevented.* The Bureau will call upon the Coast Guard, should they find it necessary. I hope it will not be necessary." (Emphasis ours.)

and contravenes a long list of decisions by this Court. The Court of Appeals in effect says that when the District Court talked about an "intervening cause breaking the previously existing chain of causation," the District Court was really talking about unforeseeability. That argument does not wash. If the damage was really unforeseeable, the District Court would have so found and that would have been an end to the case, applying tort principles as did the District Court. It is Hornbook law under tort principles that damage which is unforeseeable does not give rise to a cause of action. There would have been no need for the District Court to get into the question of intervening cause at all.

The Court of Appeals thus fashioned a completely new and different finding which was a mixed question of fact and law and, having done so, affirmed the District Court's judgment upon a basis which the District Court did not find and, on the basis of that court's opinion, *could not have found*. Had damage from fire not been foreseeable, there would have been no point in the District Court discussing and reaching its result upon the basis of "independent intervening cause."

In Footnote 1 to its Opinion, 5aa, 438 F. 2d at 806, the Court of Appeals notes that "under ordinary circumstances, this mistake might rise to the level of reversible error . . ." and attributes the District Court's error largely to language used by the parties in their briefs. At 10aa, 438 F. 2d at 808, it quotes a portion of the brief of this petitioner before that Court. But before the Court of Appeals, this petitioner made two arguments. It argued primarily that contract principles were applicable and that superseding cause is a tort concept. The Court of Appeals accepted that argument. The petitioner also argued to the Court of Appeals that "Assuming, *arguendo* only, that the superseding cause concept would nevertheless apply, the

Court below was wrong." It is in that context that the portion quoted in that Court's opinion, as taken from the "Appellate Brief" of this petitioner, must be examined. The page from petitioner's Brief from which both quotes are taken is reproduced 83aa.

It is, we submit, not accurate for the Court of Appeals to suggest that the District Court was led into "inappropriate use of tort-negligence language." The District Court decided the case on tort principles and made its findings based thereon. The Court of Appeals has fashioned its own mixed finding of fact and law and held that damage by fire was unforeseeable, a finding the District Court did not and, we submit, could not have correctly made on the basis of the record and other findings in its own Opinion.

F. R. C. P. 52(a) and this Court's decision in *McAllister v. U. S.*, 348 U. S. 19 and *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605 prohibits this. It is no answer to say that this is an Admiralty case where the Court of Appeals was free to substitute its own findings upon a review of the record, for this Court's decision in *McAllister* forbids that. As this Court said in *Graver:*

> "It is not for this Court to even essay an independent evaluation of the evidence. This is the function of the trial court." 339 U. S. 605 at 611.

A fair interpretation of the decision of the Court of Appeals is that it was saying that if the trial court had applied the proper standard, it would have concluded that the fire was not foreseeable. It is clear from the evidence already quoted that damage from fire was foreseen by the petitioner, for the prevention of fire was the very reason petitioner had engaged the services of the respondent to oversee the loading and stowage of the hazardous cargo. Surely the Court of Appeals is substituting its own finding when it states

that the firm of experts hired to guard against fire is not liable for its breaches of contract because damage by fire was unforeseeable.

The Court of Appeals has decided this point in this case contrary to F. R. C. P. 52(a) and this Court's clear holding in *McAllister v. U. S.*, 348 U. S. 19. It should have remanded the case for findings by the District Court consistent with its opinion upon the applicability of contractual as opposed to tort standards.

CONCLUSION.

The various Courts of Appeal differ drastically on the question of indemnity where the indemnity claim is asserted by the joinder of the indemnitor under F. R. C. P. 14. The entire basis of the Third Circuit's decision in *Humble Oil v. Philadelphia Ship Maintenance, supra,* — F. 2d — turns upon the fact that the indemnitor there had not been joined as a third party defendant in the claim of the original plaintiff against Humble. The Sixth Circuit has held that even where the indemnitor has been joined as a third party defendant, a settlement during litigation must nevertheless be tendered to the third party defendant, or the indemnitee must assume the burden of proving its own liability to the plaintiff. Third party claims seeking indemnity comprise a substantial percentage of cases being litigated in Federal Courts and the guidance of this Court is urgently needed.

In this case, in addition to promulgating an unfortunate rule of indemnity law, the Court of Appeals has substituted its own mixed finding for that of the District Court under circumstances where the record indicates that the District Court, by clear implication, had reached a different finding. That contravenes the rules of decision of this Court and should be corrected by this Court.

Respectfully submitted,

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Appendix.

OPINION OF U. S. C. A. 6, 2/5/71.

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

No. 20,126.

SKIBS A/S GYLFE, AS SUCCESSOR IN INTEREST TO TANKREDERIET GEFION A/S AS OWNER OF THE MOTORSHIP FYDA, ET AL.,

Plaintiffs,

v.

HYMAN-MICHAELS COMPANY AND LAKES SHIPPING AND TRADING COMPANY,

Defendants and Third Party Plaintiffs-Appellants,

v.

NATIONAL CARGO BUREAU, INC.,

Third Party Defendant-Appellee.

No. 20,127.

SKIBS A/S GYLFE, AND FORSIKRINGS-ASKJELSKAPET VEGA,
Plaintiffs-Appellants,

v.

NATIONAL CARGO BUREAU, INC., AND G. P. SULLIVAN,
Defendants-Appellees.

No. 20,128.

SKIBS A/S GYLFE, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 20,129.

THE TOKYO MARINE & FIRE INSURANCE COMPANY, ET AL.,
Plaintiffs,

v.

HYMAN-MICHAELS COMPANY,
Defendant and Third Party Plaintiff-Appellant,

v.

NATIONAL CARGO BUREAU, INC.,
Third Party Defendant-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Decided and Filed February 5, 1971.

Before: PHILLIPS, *Chief Judge,* and PECK and BROOKS, *Circuit Judges.*

BROOKS, Circuit Judge. In July, 1961, the Norwegian vessel Gyda and its cargo of steel turnings (finely shredded scraps of steel) were damaged as a result of the spontaneous combustion of the cargo. Eleven lawsuits, several with cross-claims and third-party defendant claims, were instituted to recover for the damage. Ten of these lawsuits were filed by the owners of the ship and its underwriters, and one action was brought by the owner of the cargo and its underwriters. Four of the lawsuits were dismissed prior to trial, and the remaining seven actions were consolidated for trial. Of the remaining seven actions, six were non-jury admiralty cases brought by the shipowners; one was a civil jury action brought by the owners and underwriters of the cargo. During trial, several additional actions were dismissed and certain claims settled.

In this consolidated appeal, four of the actions' final judgments are presented for review. For purposes of clarity, the facts and nature of each action and the issues raised by the respective appeals will be treated separately. An overall picture of the circumstances surrounding this protracted litigation and the District Court's disposition of the non-jury cases can be found in *Skibs A/S Gylfe, et al. v. Hyman-Michaels Company v. National Cargo Bureau, Inc.* (third-party defendant), 304 F. Supp. 1204 (1969).

No. 20,127.

SKIBS A/S GYLFE AND FORSIKRINGS-ASKJELSKAPET VEGA

v.

NATIONAL CARGO BUREAU, INC. AND G. P. SULLIVAN

This breach of contract action is one of the non-jury admiralty cases brought by the shipowners, Skibs A/S Gylfe, as successor in interest to the original owners of the A/S Gyda, and the hull underwriters of the Gyda, Forsikrings-Askjelskapet Vega, against National Cargo Company. National Cargo was engaged by the shipper of the steel turnings, Hyman-Michaels Company, to perform services relating to the shipping of the steel turnings. National Cargo impleaded Hyman-Michaels as a third-party defendant to this action. However, as National Cargo has been exonerated from liability by the District Court's judgment, the third-party claim was dismissed below and has not been pressed on this appeal. The shipowners' contract action against National Cargo is a third-party beneficiary claim based upon National Cargo's contract with the shippers of the steel turnings to oversee the loading of the cargo, make periodic tests of the temperature of the stowage and advise as to its safe character. It is alleged that National Cargo breached its contractual warranty of workmanlike service by not properly supervising the loading of the cargo, by not continuing to make tests of the temperature of the stowage and by not informing the shipowners of the overheating of the stowage. Damages for the injury to the ship and its cargo are sought from National Cargo for its breach of contract.

The District Court made certain findings of fact and conclusions of law and concluded:

1. National Cargo warranted to perform its contractual obligations to the shippers of the steel turnings in a workmanlike fashion, and that the shipowners received the benefit of this warranty as a third-party beneficiary, see *Ryan Stevedoring Company v. Pan-Atlantic S. S. Corporation,* 350 U. S. 124 (1956).

2. National Cargo breached this warranty in a number of material respects, but that

3. National Cargo's breach of warranty did not make them liable for the damages to the ship and its cargo because the shipmaster's applying water to the spontaneously overheating cargo "constituted an intervening cause and broke the previously existing chain of causation."[1]

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1. The District Court here and at other points in its opinion erroneously interchanged language used in contract law with terms used in tort-negligence law. (See e.g. Skibs A/S v. Hyman-Michaels Company, 304 F. Supp. 1204, 1221 (1969). "[T]his Court has found that NCB's breach of its contractual undertakings was not a proximate cause of the damage suffered by the ship . . . .") The irony of the situation is that the District Court clearly recognized and correctly ruled that the shipowners had no cause of action against National Cargo based on a negligence theory, 304 F. Supp. 1204, 1222. However, even after recognizing this fact, the Court continued to use negligence terminology such as "proximate cause," "intervening cause" and "superseding cause" in reaching its decision that National Cargo was not liable under its loading contract for the damage to the ship. Part of this confusion understandably resulted from the complexity of this protracted litigation which involved actions based on contract and tort theories. In addition, some states for public policy reasons permit injured third parties to recover for "breach of implied warranties" on negligence theory to circumvent the requirements of contractual privity. However, in these types of stevedoring cases the courts treat the breach of implied warranty of workmanlike service between the actual parties as strictly contractual and permit injured shipowners to proceed under contract theory as third-party beneficiaries. See Ryan Stevedoring Company v. Pan-Atlantic S. S. Corporation, *supra.* It must be added that the parties

The shipowners contend that the District Court erred in holding that National Cargo's contractual obligations with respect to the steel turnings was only to supervise and offer expert opinion as to the safe character of the cargo at the point of loading in Muskegon, Michigan. It is argued that National Cargo was under a continuing obligation to advise as to the safe character of the cargo and it breached this responsibility by not advising the shipowner of the dangerous overheating of the cargo in hold No. 3 when the ship docked in Detroit. The District Judge reviewed all the documents which comprised the contract between National Cargo and the shippers of the cargo. In addition, he examined the pertinent testimony to determine the parties' intent in entering into the contract. The Court's conclusion that National Cargo's contractual obligations were restricted to supervising loading at Muskegon and giving advice as to the safe character of the cargo only at the point of loading is supported by the record and is not clearly erroneous. Federal Rules of Civil Procedure, Sec. 52(a).

The shipowners also challenge the District Court's conclusion that while National Cargo breached its warranty of workmanlike service, the "causal link" between this breach and the ultimate damage to the ship and its cargo was cut by the shipmaster's negligence.[2] Specifically, the

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themselves contributed to the error by incorrectly interchanging terminology in their pleadings and at trial.

Under ordinary circumstances this mistake might rise to the level of reversible error since contract principles correctly applied impose different standards of proof than negligence principles. However, in this case, the District Court's findings of fact also support the conclusion that National Cargo's breach of contract did not make them liable because remoteness in space and time and the number of intervening events made the damage to the ship unforeseeable.

2. For the purpose of deciding in this contract action that National Cargo was not liable for the unforseen damage to the ship, it was unnecessary for the Court to have concluded that the shipmaster's applying water to the overheating cargo was a negligent act.

Court held that the shipmaster acted negligently in applying water to the overheating turnings in hold No. 3; in sailing from Montreal knowing of the extremely dangerous overheating of the cargo in hold No. 3; and by applying additional water to the cargo after sailing from Montreal. It was in part this conduct of the shipmaster and the lapse of time and space between the loading of the ship and the fire which damaged it that the Court found broke the "causal chain" between National Cargo's breach of warranty and the damage to the ship and cargo. These findings of fact are binding unless it can be said that they are clearly erroneous, *Processteel, Inc. v. Mosley Machinery Company, Inc.* — F. 2d — (6th Cir. 1970) (Decided February 5, 1970), and while the legal conclusion that a "causal chain" was broken is theoretically incorrect, the findings of fact can only support a conclusion that the damages to ship and cargo were unforeseen as viewed from the point when National Cargo breached its contract.

No. 20,128.

SKIBS A/S GYLFE, ET AL.

v.

UNITED STATES OF AMERICA

This non-jury admiralty negligence action was brought by the shipowners against the United States, claiming that the Coast Guard had voluntarily assumed a duty of due care by detaining the ship at Detroit because of the overheating

of the cargo and then negligently breached this duty by permitting the ship to leave port while the temperatures of cargo were in excess of safe limits prescribed by the Dangerous Cargo Act (46 U. S. C. § 170), and the regulations promulgated pursuant to that statute. The District Court found that the regulations relied upon (33 C. F. R. § 6.04-8, 6.12-1 and 6.14-1) did not require the Coast Guard to detain a ship with over-heated steel turnings, but that 46 U. S. C. § 170(12) [46 C. F. R. § 146.02-6] did place the primary duty of enforcement of the Dangerous Cargo Act upon the Coast Guard and gave it authority to detain ships to ascertain if an infraction of the Dangerous Cargo Act had occurred. However, it was concluded that the Coast Guard did not act negligently in permitting the ship to leave Detroit.

The District Court's decision that the Coast Guard did not act negligently in releasing the ship at Detroit is challenged by the shipowners. Here again we are asked to overturn a conclusion of law of the District Court based upon its findings of fact because they are clearly erroneous. The District Court carefully examined technical evidence respecting the safe range of temperatures of steel turnings while in stowage aboard a ship. Testimony of the Coast Guard officer in charge at the Port of Detroit was heard as was testimony given by the master of the ship which was damaged. Having received and considered all the evidence bearing on the issue of whether the Coast Guard was negligent in permitting the ship in question to leave port, the Court concluded that there was no negligence in not further detaining it. The findings of fact and conclusions of law based thereupon are amply supported by evidence in the record and cannot be labeled as "clearly erroneous".

No. 20,126.

SKIBS A/S GYLFE

v.

HYMAN-MICHAELS COMPANY AND
LAKES SHIPPING AND TRADING COMPANY

v.

NATIONAL CARGO BUREAU, INC.

This was a non-jury civil action brought by the shipowners against Hyman-Michaels, the shipper of the steel turnings. Hyman-Michaels implead National Cargo claiming that National Cargo's breaching of its contract would make it liable to them if they, as the shipper of the steel turnings, were found liable to the shipowners. During the trial, Hyman-Michaels settled with the shipowners (several other actions were then dismissed) and the only dispute remaining was that between the shipper of the cargo, Hyman-Michaels, and National Cargo, for breach of its loading contract. This action retained the characteristics of the third-party defendant claim of attempting to transfer liability. The District Court held for National Cargo and Hyman-Michaels appeals. Three issues are raised by the appeal from this decision.

First, it is argued that for Hyman-Michaels to recover from National Cargo on its third-party claim, it is not necessary that it prove that it was actually liable to the shipowners for the damage to the ship. This question has already been presented to this Court by an interlocutory appeal and was resolved adversely to Hyman-Michaels' contentions. See, *Tankrederiet Gefion A/S v. Hyman-Michaels Company,*

406 F. 2d 1039 (6th Cir. 1969). That issue was properly resolved by the interlocutory appeal, and it requires no further discussion. (This same question is raised in appeal No. 20,129, *The Tokyo Marine & Fire Insurance Company, et al. v. Hyman-Michaels v. National Cargo Bureau, Inc.* [Third-Party Defendant] *infra*, but will not be given further consideration.)

The second issue raised is that the District Court erred in its determination that National Cargo's contract with Hyman-Michaels pertained only to supervising loading and giving expert opinion as to the character of the cargo at Muskegon, Michigan. Hyman-Michaels contends, as did the shipowners in appeal No. 20,127, that National Cargo had a duty to give an opinion as to the safe character of cargo when the ship docked in Detroit. The argument Hyman-Michaels now advances is somewhat different than that advanced by the shipowners. However, we hold that the District Court's ruling on the scope of National Cargo's undertaking finds support in the record and is not clearly erroneous.

Last, Hyman-Michaels argues that the District Court erred in applying tort principles of "superseding cause" to this contract action. The issue is phrased in their appellate brief as:

> "Under the circumstances and evidence in this case, was the action of the Captain in applying water to the turnings following the sailing of the ship from Montreal on or about July 3 an independent intervening cause?"

The inappropriate use of tort-negligence language in the various contract actions has already been briefly discussed. See note 1, *supra*. It is worthy to note that while the complaint is lodged against the District Court's use of the

negligence language "superseding cause" Hyman-Michaels has formulated its objection by using a negligence phrase, i.e., "independent intervening cause". Both parties have cited contract cases in which expressions of causation traditionally appearing in negligence actions have been used. Yet, it is elementary that in contract theory a party who breaches a contract has its ultimate damage liability for that breach gauged by the test of foreseeability of the injury resulting therefrom. *Restatement of Contracts* § 330. In determining foreseeability questions of "remoteness in time and space and the number of intervening events" are considered to decide whether a breaching party to a contract had reason to foresee the injury. The fact that someone or something else in fact "caused" the injury may or may not in varying situations affect the liability of the breaching party if the party had or should have had reason to foresee that the injury would result, but in the present case clearly the supplying of water by the captain to his cargo was not a reasonably foreseeable circumstance.

The point is well taken that certain inappropriate language was used by the District Court in its opinion. However, all parties actively, although perhaps unconsciously, contributed to the error and the findings of fact made by the District Court are not clearly erroneous and support the conclusion (phrased in contract terms) that National Cargo is not liable in money damages for its breach of contract because the injury to the ship and its cargo was unforeseeable.

No. 20,129.

THE TOKYO MARINE & FIRE INSURANCE COMPANY, ET AL.

v.

HYMAN-MICHAELS COMPANY

v.

NATIONAL CARGO BUREAU, INC.

This civil jury breach of contract action was brought by the purchaser of the cargo, Mitsubishi Shoji Kaisha, Ltd., and the Japanese insurer of the cargo against the shipper of the cargo, Hyman-Michael and Michigan Foundry Supply Company which originally sold the steel turnings to Hyman-Michaels. Hyman-Michaels and Michigan Foundry Supply Company implead National Cargo. During the trial Hyman-Michaels and Michigan Foundry Supply settled with the Japanese purchaser of the cargo and the question of National Cargo's liability to the third-party plaintiffs (original defendants) was resolved by the jury in National Cargo's favor. Only Hyman-Michaels appeals from the jury verdict. One issue is assigned as error.

Hyman-Michaels maintains that it was error for the District Court to have instructed the jury that the purchase contract entered into between Mitsubishi and Hyman-Michaels contained an implied warranty that the steel turnings at the time of shipment were reasonably fit for transportation. When this purchase contract was entered into the Uniform Sales Act was in effect in Michigan, and Hyman-Michaels argues that Section 15 of that Act prohibits implying warranties when a buyer orders definite, clearly described or specific goods. A reading of Section 15 of the

Uniform Sales Act and the Michigan cases cited by Hyman-Michaels, see, e.g., *F. M. Sibley Lumber Company v. Schultz*, 297 Mich. 206, 297 N. W. 243 (1941); *Beaman v. Testori*, 323 Mich. 194, 35 N. W. 2d 155 (1948), indicates that the rule relied upon prohibits implying a warranty of fitness for a purpose when a buyer orders definite or specific goods. However, in this case, we are dealing with an implied warranty that the goods at the time of shipment were reasonably fit for transportation. Michigan cases tend to indicate that a warranty of fitness for a purpose is not as broad in scope to encompass a warranty that goods are fit for shipment. See, *Richardson v. Messina*, 361 Mich. 364, 105 N. W. 2d 153 (1960); *Wade v. Chariot Trailer Company*, 331 Mich. 576, 50 N. W. 2d 162 (1951). In addition, while no Michigan cases can be found that deal with the question, it appears that a warranty of fitness for shipment is a separate and distinct warranty from that of fitness for a purpose and is properly implied in contracts such as the one in question in the present case. See, *Harp v. Hass-Phillips Produce Company*, 205 Ala. 573, 88 So. 740 (1921); *Metal Furniture Company v. Goss*, 158 Ark. 145, 249 S. W. 550 (1923). Therefore, it is concluded that the District Court's instruction that the contract between Mitsubishi and Hyman-Michaels gave rise to a warranty that at the time of shipment the goods were reasonably fit for transportation was proper.

Affirmed.

OPINION OF U. S. C. A. 6, 2/10/69

TANKREDERIET GEFION A/S, AS OWNER OF THE MOTORSHIP GYDA,

Plaintiff,

v.

HYMAN-MICHAELS COMPANY AND LAKES SHIPPING & TRADING CORP.,

Defendants and Third-Party Plaintiffs-Appellants,

v.

MICHIGAN FOUNDRY SUPPLY CO., INC., ERICKSON TRUCKING SERVICE, INC.,

Third-Party Defendants,

AND

NATIONAL CARGO BUREAU, INC.,

Third-Party Defendant-Appellee.

TANKREDERIET GEFION A/S, AS OWNER OF THE MOTORSHIP GYDA,

Plaintiff,

v.

MICHIGAN FOUNDRY SUPPLY CO., INC.,

Defendant and Third Party Plaintiff-Appellant,

v.

ERICKSON TRUCKING SERVICE, INC.,

Third-Party Defendant,

AND

NATIONAL CARGO BUREAU, INC.,

THIRD-PARTY DEFENDANT-APPELLEE.

TANKREDERIET GEFION A/S, AS OWNER OF THE MOTORSHIP GYDA,

Plaintiff,

v.

NATIONAL CARGO BUREAU, INC.;

Defendant-Appellee,

W. P. LEWIS AND G. P. SULLIVAN,

Defendants.

NATIONAL CARGO BUREAU, INC.,

Third-Party Plaintiff-Appellee,

W. P. LEWIS AND G. P. SULLIVAN,

Third-Party Plaintiffs,

v.

LAKES SHIPPING AND TRADING CORPORATION, AN ILLINOIS CORPORATION, HYMAN-MICHAELS COMPANY, AN ILLINOIS CORPORATION, MICHIGAN FOUNDRY SUPPLY CO., A MICHIGAN CORPORATION,

Third-Party Defendants-Appellants,

AND

ERICKSON TRUCKING SERVICE, INC., A MICHIGAN CORPORATION,

Third-Party Defendant.

THE TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., A FOREIGN CORPORATION, ET AL.,
Plaintiffs,

v.

HYMAN-MICHAELS COMPANY, AN ILLINOIS CORPORATION, AND MICHIGAN FOUNDRY SUPPLY COMPANY, INC., A MICHIGAN CORPORATION,
Defendants and Third-Party Plaintiffs-Appellants,

v.

NATIONAL CARGO BUREAU, INC.,
A NEW YORK CORPORATION,
Third-Party Defendant-Appellee,

AND

ERICKSON TRUCKING SERVICE, INC., A MICHIGAN CORPORATION,
Third-Party Defendant.

No. 19167.

United States Court of Appeals
Sixth Circuit.
Feb. 10, 1969.

Before O'SULLIVAN, EDWARDS and MCCREE, *Circuit Judges,*

EDWARDS, *Circuit Judge.*

Appellants Hyman-Michaels Co. and Michigan Foundry Supply Co. appeal on leave granted from an interlocutory order entered by a District Judge in the United States District Court for the Eastern Distrdict of Michigan. The order was entered during trial of eleven cases arising out of a spontaneous combustion fire in a load of steel scrap which damaged both the cargo and the ship in which it was being transported to Japan.

After close of plaintiffs' proofs and the taking of considerable testimony from defendants, appellants [principal defendants in the trial] entered into a settlement with plaintiffs Tankrederiet Gefion A/S, as owner of the Motorship GYDA, and Mitsubishi, a Japanese trading company, owner of the cargo. Subsequently, as the trial continued, on appellants' complaints against third-party defendant National Cargo Bureau, which had been filed under Rule 14(a) of the Federal Rules of Civil Procedure, National Cargo Bureau objected to plaintiffs' tender of proofs concerning the prudence and reasonableness of their settlement. Thereupon after extensive argument the District Judge entered the following order:

> "It Is Hereby Ordered that in all further proceedings in these cases it shall be the burden of the Third-Party Plaintiffs Hyman-Michaels Company and Michigan Foundry Supply Company, Inc., to establish their actual liability to the plaintiffs before they shall be entitled to recover indemnity or contribution.
>
> "It Is Further Ordered that no evidence as to the reasonableness of settlements or the reasonableness of the amount of the settlements may be received in evidence."

It is this order from which the interlocutory appeal is taken.

This appeal is heard upon the following stipulation of facts:

"(1) This litigation involves a consolidation of a number of suits arising out of the shipment of a cargo of 6,000 tons of steel turnings on board the Norwegian Motorship GYDA in the summer of 1961. The turnings were loaded at Muskegon, Michigan, consigned to Japan. Spontaneous heating of the cargo followed. The ship anchored in Detroit for approximately nine days in the hope that the cargo would cool. Thereafter it sailed, and upon arrival at Philadelphia the cargo was unloaded because of fire which damaged the ship and cargo. The total of all of the alleged damages is approximately $750,000.

"(2) Eleven suits, many with cross-claims and third-party claims, were filed and later consolidated for trial by order of the Trial Court. The Trial Court also ordered a severance of the trial of the damage issues, with the trial of the liability issues to proceed first, in order of time. Four of the suits have been dismissed for various reasons.

"(3) Trial of the liability issues commenced before the Honorable Chief Judge Ralph M. Freeman of the Court below on June 18, 1968. Six of these actions are non-jury cases. These are the actions brought by the ship owner plaintiffs. The other action brought by the cargo owner plaintiffs, is a jury action. All seven actions were being tried simultaneously. One of these actions was dismissed at the close of the plaintiffs' proofs. Six are still in progress, including the case being tried to the jury. This appeal directly involves only the jury case, Civil No. 24638, and three of the non-jury cases, Admiralty Nos. 23990, 23991 and 25386.

"(4) Civil Action No. 24638 involves suit by the cargo plaintiffs against Hyman-Michaels Company and Michigan Foundry Supply Company. The defendants have filed third party complaints against National Cargo Bureau seeking indemnity and contribution.

"Admiralty No. 23990 involves suit by the ship owner plaintiffs who have brought suit against Hyman-Michaels Company and Lakes Shipping & Trading Corporation, who have third party complaints against National Cargo Bureau, seeking indemnity and contribution.

"Admiralty No. 23991 involves a suit by the ship owner plaintiffs against Michigan Foundry Supply Company, who has a third party complaint against National Cargo Bureau seeking indemnity and contribution.

"Admiralty No. 25386 involves suit by the ship owner plaintiffs against National Cargo Bureau, who has a third party complaint against Hyman-Michaels Company, Lakes Shipping & Trading Corporation, Michigan Foundry Supply Company and Erickson Trucking Service, seeking indemnity and contribution.

"(5) From time to time during the course of the trial, possibility of settlement was discussed both in and out of the Court's presence. From the first instance, National Cargo Bureau indicated that it did not wish to participate in any settlement. In view of National Cargo Bureau's position, some of the other defendants conducted settlement negotiations with the plaintiffs both in and out of the presence of the Court. National Cargo Bureau did not participate in these negotiations. In connection with preliminary settlement discussions and before final settlement negoti-

ations, counsel for National Cargo Bureau was asked if it would dismiss its third party complaint against Hyman-Michaels Company, Michigan Foundry Supply Company and Erickson Trucking Service, who eventually settled with the plaintiffs, and National Cargo Bureau replied that it would not.

"The defendants Hyman-Michaels Company, Lakes Shipping & Trading Corporation, Michigan Foundry Supply Company and Erickson Trucking Service made settlement agreements with the plaintiffs, and after these agreements had been arrived at National Cargo Bureau was advised of the settlement agreements and was advised of the total amounts that would be paid to the plaintiffs, and was further advised that the settling defendants intended to continue their third party actions against National Cargo Bureau.

"After the settlement agreements had been reached and after National Cargo Bureau had been advised of the settlements, the settling defendants proceeded with their proofs on their third party actions for indemnity and contribution. In the course of presenting proofs, there came a time when the settling defendants proposed to offer evidence that the settlements were prudent and reasonable. National Cargo Bureau objected to the introduction of this proposed evidence, and asserted that the settling defendants must prove actual liability and not merely potential liability to the plaintiffs.

"After hearing arguments of Counsel, the Court rendered an opinion and entered an order to the effect that the settling defendants, as a condition precedent to their claims for indemnity and contribution, had the burden of proving actual liability to the plaintiffs rather than potential liability to the plaintiffs."

Although not included in the stipulation above, an additional fact crucial to our decision is cited in appellee's brief in this appeal, is not denied in appellants' briefs, and was conceded by appellants at oral hearing. This is the fact that, although appellee had full notice of the litigation and was interpleaded as a party thereto, and further, was notified of the settlement negotiation and invited to participate therein, appellants did not prior to settlement seek appellee's approval or tender the defense of this action to appellee in exchange for a hold-harmless agreement.

In this case the appellants (the original defendants, henceforth B) settled the claim of the original plaintiffs, A, without first tendering the defense to the appellee (the third-party defendant, C) in exchange for a hold-harmless agreement. In these circumstances the District Judge required B to prove actual liability to A in his suit against C.

The District Judge's holding when applied to the facts of this case is, we believe, in accord with the majority view. The following cases tend to uphold the general rule that an indemnitee must show actual liability to recover against an indemnitor. The TOLEDO, 122 F. 2d 255 (2d Cir.), cert. denied, Isbrandtsen-Moller Co. v. The TOLEDO, 314 U. S. 689, 62 S. Ct. 302, 86 L. Ed. 55 (1941); Jennings v. United States, 374 F. 2d 983 (4th Cir. 1967); Nelson v. Sponberg, 51 Wash. 2d 371, 318 P. 2d 951 (1957); Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214, 67 N. E. 439 (1903); Donald v. Guy, 127 F. 228 (E. D. Va. 1903).

In *The TOLEDO* the Court said:

> "A claim for indemnity, however, requires that an actual liability be sustained by the indemnitee, and if he settles a claim without a determination of the rights in question, he bears the risk of proving an actual liability in the action over for indemnity." The TOLEDO, 122 F. 2d at 257.

In *Jennings,* the Fourth Circuit, through Judge Sobeloff, said:

> "The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements." Jennings v. United States, 374 F. 2d at 986.

Cases where the original defendant's claim for indemnification is founded on a judgment are, of course, distinguishable from the instant case, since actual liability has been established. City of Chicago v. Robbins, 2 Black 418, 67 U. S. 418, 17 L. Ed. 298 (1862); Robbins v. City of Chicago, 4 Wall. 657, 71 U. S. 657, 18 L. Ed. 427 (1866); City of Detroit v. Grant, 135 Mich. 626, 98 N. W. 405 (1904).

Distinguishable also are cases where the third party was tendered the defense and refused it. St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., 201 U. S. 173, 26 S. Ct. 400, 50 L. Ed. 712 (1906); West Coast Terminals Co. of Calif. v. Luckenbach Steamship Co., 349 F. 2d 568 (9th Cir. 1965); Damanti v. A/S Inger, 314 F. 2d 395 (2d Cir. 1963); Moses-Ecco Co. v. Roscoe-Ajax Corp., 115 U. S. App. D. C. 366, 320 F. 2d 685 (1963); California Stevedore & Ballast Co. v. Pan-Atlantic Steamship Corp., 291 F. 2d 252 (9th Cir. 1961); Chicago, Rock Island & Pacific Ry. Co. v. Dobry Flour Mills, 211 F. 2d 785 (10th Cir. 1954).

Obviously distinguishable also are cases where the original defendant's claim against the third party is founded upon a written contract of insurance or indemnification where the insurance company or indemnitor agreed to defend or to pay damage claims against another. St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., 201 U. S. 173, 26 S. Ct. 400, 50 L. Ed. 712 (1906); Moses-Ecco Co. v. Roscoe-Ajax Corp., 115 U. S. App. D. C. 366, 320

F. 2d 685 (1963). In these cases ultimate decision turns upon the language of the contractual undertaking. Thus in *St. Louis Dressed Beef & Provision Co.* Justice Holmes said:

> "We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise, no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion. But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution." St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., 201 U. S. at 182, 26 S. Ct. at 404.

These words, however, were written in a quite different context than that provided by the facts of our instant case. In *St. Louis Dressed Beef & Provision Co.* party C was an insurance company which violated an express insurance contract which required it to defend party B after it had had notice and demand for such defense. In addition, in relation to B's suit against C in *St. Louis Dressed Beef,* the Court of Appeals certified to the Supreme Court that party B was liable on A's claim which party B had settled. In addition, Justice Holmes' holding was bottomed on an interpretation of the language of the insurance contract which called upon party C to pay such "claims" as party B was "compelled" to pay.

One court has held in a Federal Tort Claims Act case that a claimant against the United States need only prove probable liability and reasonableness of the settlement which he made with his injured employee. Chicago, Rock Island & Pacific Ry. Co. v. United States, 220 F. 2d 939 (7th

Cir. 1955). The Court, however, relied strongly upon the broad language of the F. T. C. A.

All in all, we believe the position taken by the District Judge is sound. We recognize the interest the courts have in encouraging settlements. We also recognize the difficulties of requiring a party who has been engaged in contesting liability suddenly to turn about and seek to prove the truth of that which he has been denying. But the settlement itself represents a substantial change of position, and certainly the original defendant has the right to turn about and point to the facts which occasioned it.

More important, however, is the fact that a tender of the defense in exchange for a hold-harmless agreement is a feasible protection for the party desiring to settle, as well as for the proposed indemnitor. It certainly seems appropriate for B, the party desiring to settle and possessing the facts pertaining to the settlement, to be required to tender C the choice of approving the settlement or of going forward with the defense in exchange for a hold-harmless agreement. We assume that such a hold-harmless agreement would constitute C's financially responsible guarantee that B would under no circumstances be forced to pay more than the sum for which it was prepared to settle. If such a tender were refused and B settled, then we think the proofs required in the subsequent suit against C would appropriately be potential liability and reasonableness of the settlement.

The ultimate problem with any other rule than that which the District Judge laid down here is that potentially it would allow B (the original defendants) to spend C's (the third-party defendant) money without the final judgment of a court or C's agreement. Deciding whether to try a case to judgment or to settle it involves elements of legal evaluation, of financial capacity to take risk, and of appetite for

court room conflict which vary widely among litigants. We hold that under the facts of this Case B cannot compel C to accept B's evaluation of these critical factors. Any other rule would deny C any opportunity to contest B's liability to A—a liability which C may be required to pay.

In this case we do not think that any conduct on the part of C (appellee herein) constituted a waiver of its right to a tender of the defense. Of course, C had full knowledge of the litigation, and further, as we have noted, knew that settlement negotiations were going on. But, clearly, again as noted above, B never made a formal tender of the defense. And there is nothing in this record to show that B ever disclosed the settlement terms to C and asked C, as a potential indemnitor, to approve.

The order of the District Judge is affirmed.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING.

(Filed March 18, 1971)

Before: PHILLIPS, *Chief Judge,* and PECK and BROOKS, *Circuit Judges.*

The petition for rehearing in banc filed by Hyman-Michaels Company and Lakes Shipping and Trading Company, defendants and third party plaintiffs-appellants, has been considered. None of the judges of this Court who are in regular active service has favored ordering consideration in banc.

It is ORDERED that the petition is denied.

Entered by order of the Court

CARL W. REUSS
Clerk

OPINION OF DISTRICT COURT FREEMAN, J. 9/4/69.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT.

IN ADMIRALTY
CIVIL No. 23990

SKIBS A/S GLYFE, AS SUCCESSOR IN INTEREST TO TANKREDERIET GEFION A/S, AS OWNER OF THE MOTORSHIP GYDA, ET AL.,

v. *Plaintiffs,*

HYMAN-MICHAELS COMPANY AND LAKES SHIPPING & TRADING CORPORATION,
Defendants and Third-Party Plaintiffs,

v.

NATIONAL CARGO BUREAU, INC.,
Third-Party Defendant.

IN ADMIRALTY
CIVIL No. 23991

SKIBS A/S GYLFE, AS SUCCESSOR IN INTEREST TO TANKREDERIET GEFION A/S, AS OWNER OF THE MOTORSHIP GYDA,

v. *Plaintiffs,*

MICHIGAN FOUNDRY SUPPLY COMPANY, INC.
Defendant and Third-Party Plaintiff,

v.

NATIONAL CARGO BUREAU, INC.,
Third-Party Defendant.

IN ADMIRALTY
CIVIL No. 25386

SKIBS A/S GYLFE, AS SUCCESSOR IN INTEREST TO TANKREDERIET GEFION A/S, AS OWNER OF THE MOTORSHIP GYDA, ET AL.,

Plaintiffs,

v.

NATIONAL CARGO BUREAU, INC., AND G. P. SULLIVAN,

Defendants and Third-Party Plaintiffs,

v.

HYMAN-MICHAELS, LAKES SHIPPING & TRADING CORPORATION, MICHIGAN FOUNDRY SUPPLY COMPANY, INC., AND ERICKSON TRUCKING SERVICE,

Third-Party Defendants.

IN ADMIRALTY
CIVIL No. 23964

SKIBS A/S GYLFE, AS SUCCESSOR IN INTEREST TO TANKREDERIET GEFION A/S, AS OWNER OF THE MOTORSHIP GYDA, ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION.

FREEMAN, *District Judge.*

On July 8, 1961, the Norwegian Motorship Gyda, carrying a shipment of steel turnings consigned to Mitsubishi, a Japanese company, arrived in Philadelphia and was required to anchor in the explosives anchorage due to the spontaneous heating of her cargo. On July 14, unloading of the turnings commenced, and extensive fires resulted. Substantial damage was sustained by the ship as well as the cargo. As a consequence, eleven suits, many with cross-claims and third-party claims, were filed—ten by the owner of the ship and its underwriters and one by the owner of the cargo and its underwriters. Prior to trial, four of these suits were dismissed for various reasons. The remaining seven actions were consolidated for trial, which proceeded only on the liability issues pursuant to an agreed order of severance of the damage issues. All seven cases were tried simultaneously commencing June 18, 1968. Six of the actions were non-jury admiralty cases brought by the shipowner plaintiffs. The other suit brought by the cargo plaintiffs was a civil jury action.

During the trial, this court dismissed the shipowner's suit against Erickson Trucking Service (26543), and one of two of the shipowner's suits against the United States (26162). The jury returned its verdict in the cargo civil case on April 14, 1969. Consequently, this court is now concerned only with the remaining four cases, Nos. 23990, 23991, 25386, and 23964.

Admiralty No. 23990 involves a suit by the shipowner against Hyman-Michaels Company and Lakes Shipping and Trading Corporation, who have third-party complaints against the National Cargo Bureau, seeking indemnity and contribution.

Admiralty No. 23991 involves a suit by the shipowner against Michigan Foundry Supply Company, which has a third-party complaint against National Cargo Bureau, seeking indemnity and contribution.

Admiralty No. 25386 involves a suit by the shipowner against National Cargo Bureau, who has a third-party complaint against Hyman-Michaels, Lakes Shipping and Trading, Michigan Foundry and Erickson Trucking Service, seeking indemnity and contribution.

Admiralty No. 23964 involves a suit by the shipowner against the United States for alleged negligence of the Coast Guard. No third-party complaint is involved.

During the course of the trial, the defendants in Nos. 23990 and 23991 settled with the shipowner plaintiffs. The only issues now remaining for determination in these cases are those of the liability of the third-party defendant, National Cargo Bureau, to the third-party plaintiffs, Hyman-Michaels, Lakes Shipping, and Michigan Foundry, for indemnity and contribution. As a result of the settlement, third-party plaintiffs in those cases must prove their actual liability to the shipowner plaintiffs [1] and establish the requisite fault on the part of the third-party defendant, National Cargo Bureau.

On February 6, 1961, Hyman-Michaels Company, of Chicago, a dealer in scrap metal, purchased 5,000 to 6,000 tons of "clean, heavy, steel turnings free of borings" from the Michigan Foundry Supply Company, of Muskegon, Michigan, also a scrap metal dealer. The contract of purchase provided that the price of the turnings was F.O.B. "Loaded, stowed and trimmed, Vessel your Dock, Muskegon, Mich." [Exhibit McDonald-1].

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1. See *Tankrederiet Gefion A/S v. Hyman-Michaels Co.*, 406 F. 2d 1039 (6th Cir. 1969), (an interlocutory appeal taken in these cases during the trial).

On March 21, 1961, Lakes Shipping and Trading Corporation, a wholly owned subsidiary of Hyman-Michaels, entered into a voyage charter for the Motorship Gyda[2] with its time charterer, Roroto S. A., a Panamanian corporation. The voyage contemplated by the charter was from the Great Lakes to Japan, with one or two intermediate stops [Exhibit Diamond-4].

On April 22, 1961, Mitsubishi entered into a contract with Hyman-Michaels to purchase 5,500 long tons of shoveling turnings, per specifications of the Institute of Scrap Iron and Steel, Inc. [Exhibit Cargo-1].

On May 31, 1961, Hyman-Michaels engaged the National Cargo Bureau[3] (NCB) to render certain services in connection with this shipment of steel turnings. The precise nature and extent of these services are in dispute and will be dealt with later in this opinion. It is sufficient for the present to note that NCB agreed to make an on hire survey in Muskegon, to perform draft surveys in Muskegon and Detroit, and to issue its "A Certificate" if the loading and stowage of the turnings conformed to applicable Coast Guard regulations. Hyman-Michaels also informed Michigan Foundry that a surveyor from NCB would be present at the time of loading.

On June 14, 1961, the Gyda arrived at Michigan Foundry's dock in Muskegon. Captain Lewis (a surveyor from National Cargo Bureau), John Kis (in charge of

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2. The Gyda was owned by Tankrederiet Gefion A/S, a Norwegian corporation. On October 1, 1964, Tankrederiet Gefion was merged into Skibs A/S Gylfe. During the trial, Skibs A/S Gylfe was substituted for Tankrederiet Gefion A/S as plaintiff in the ship cases.

3. National Cargo Bureau, the principal third-party defendant in two of these cases and a defendant and third-party plaintiff in a third case, is a corporation organized as a successor to the Boards of Underwriters of New York and San Francisco to provide various services to the shipping industry, including inspection at loading ports for safe loading and stowage.

Hyman-Michaels export scrap steel), Donald Klein (an employee of Michigan Foundry), and Captain Hemmick (the ship's agent) were there to meet it. A few hours later, after Captain Lewis had performed the on hire survey and the pre-loading portion of the draft survey, loading commenced and continued on a 24-hour per day basis until it was completed in the early morning hours of June 18. The turnings were loaded into holds 2, 3, 4, and two deep tanks of the ship.

Immediately prior to loading, Captain Lewis, accompanied by the Gyda's First Mate, Jakobson, and others, took temperatures of the pile of turnings on the dock. During most of the time the Gyda was being loaded, Captain Lewis was absent from Muskegon. However, on June 18, prior to the ship's sailing, he had returned and conferred with Jakobson relative to the temperatures which Jakobson had found in the turnings on the ship during loading [Exhibit Jakobson-3]. Captain Lewis also took a series of temperature readings of the cargo in each of the holds of the ship at this time. He then conferred with the Master in the presence of the First Mate, Kis, Hemmick, and perhaps others. What was said at that time is also in dispute.

Shortly after this conference on the 18th, the Gyda sailed for Detroit and arrived there in the early morning of June 20. No temperatures were taken of the cargo of turnings during the voyage to Detroit. At 1:45 p.m. on the 20th, the ship docked at Nicholson Terminal in Detroit to load additional cargo (scrap iron) in holds 1 and 5.

After the Gyda left Muskegon, Lewis called Captain Sullivan, NCB's surveyor in Detroit, and told him the ship was coming and that the cargo was hot. Captain Roscoe, of NCB in Chicago, also called Sullivan prior to the Gyda's arrival in Detroit and instructed Sullivan to check the temperatures aboard the Gyda when he performed his draft survey. Roscoe also told Sullivan to report the situation to

the Coast Guard if the cargo temperatures were over 130°F.

Captain Sullivan boarded the Gyda at 2:10 p.m. on June 20. After performing the pre-loading portion of the draft survey, he took temperatures in the cargo.[4] He found some temperatures well over 130°F. After leaving the ship, Sullivan contacted Chief Bosun's Mate, Sommer, of the Coast Guard at 6:10 p.m. and informed him of the temperatures. Sommer, in turn, notified his superior, Captain Malloch, Captain of the Port of Detroit, United States Coast Guard, about the heating problem on the Gyda. Malloch instructed him to keep track of the temperatures. Sommer made an informal visit to the ship that evening.

The next morning, June 21, Sommer boarded the ship and was there when Sullivan took further temperatures of the cargo. Some of these temperatures were also well above 130°F. and Sommer reported them to Captain Malloch. Later in the day, Sullivan received other readings that had been taken. These readings showed temperatures as high as 198° (Exhibit Sullivan-5B).

On June 22, Sullivan boarded the Gyda for the last time. He obtained temperature readings as high as 196°F. After leaving the ship, Sullivan consulted with Captain Malloch and agreed to keep the Coast Guard informed of the temperatures on the Gyda. It was also agreed that Sullivan would record these temperatures from the ship's log rather than take them personally.

On June 23, the ship went to anchor in the Detroit River. The temperatures found in the ship's cargo thereafter were reported to Sullivan by the Master, Kis, or the ship's agent. Sullivan kept Roscoe and the Coast Guard informed of the temperature levels. This procedure continued until June 29, the day of the ship's departure from Detroit.

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4. Henceforth, the term "cargo" will refer only to the steel turnings loaded in Muskegon. These were in holds 2, 3, 4, and both deep tanks.

On June 26, Mr. Wright, a metallurgist, came aboard the Gyda to inspect the cargo at the request of Hyman-Michaels. Wright visually inspected the cargo and took temperatures in each hold. He testified that the turnings in the deep tanks were loose, while those in the holds were packed. He said that he saw the usual bits of rags, paper, and splinters but that such debris was not excessive. It is evident that the temperatures he found were not uniform even within a given hold. What advice he gave the Master, if any, or Kis is in dispute. In any event, Wright left the Gyda on the 26th and did not return.

No further action was taken with respect to the Gyda's cargo until June 29. On the morning of the 29th, Harlow Meno, a marine surveyor, representing Scandanavian Marine Claims (SMC), the underwriter's agent, boarded the ship to inspect the cargo. He testified that following his inspection he told the Master that there was nothing unusual about the cargo in No. 2 and No. 4 holds and that they and the deep tanks were all right. However, he did say that he told the Master the turnings in No. 3 hold presented a problem and were unstable. He had found an oil haze and generally higher temperatures in No. 3 hold than elsewhere. He concluded that there were hot spots in No. 3.

After his inspection and after talking to the Master, Meno went ashore and found that arrangements could be made to discharge the cargo in No. 3 hold if that were desired. He then called Mr. Molvig of SMC in New York and reported all of the above to him. Molvig told Meno to continue watching the ship and report lack.

That afternoon Meno returned to the ship and again inspected the cargo. His findings were unchanged. He so informed the Master and also told him that arrangements could be made to discharge the cargo. Meno left the ship about 3:30 or 4:00. The Gyda sailed shortly after 5:00.

After the ship sailed from Detroit, the First Mate continued to take temperatures. [Exhibit Jakobson-4]. By the time the ship neared Montreal, the wooden sheathing along the bulkhead between No. 3 hold and the engineroom had begun to char, and smoke was coming out of No. 3 hatch. Also, the engineroom side of the bulkhead at No. 3 hold was hot in places. Temperatures taken with two thermometers on that bulkhead about four feet above the engineroom floor indicated 140° and 180° F. The Master decided to stop at Montreal and have surveyors check the cargo.

On July 2, when the ship anchored at Montreal, George Hayes, a marine surveyor representing the underwriters, and Edward Edwardson, a marine engineer acting on behalf of Hyman-Michaels and Lakes Shipping, boarded the ship. Kis, of Hyman-Michaels, was also present. Hayes testified that when he started digging into the cargo in No. 3, a small fire resulted that was about a foot in diameter. This was extinguished. Hayes also noted that the bulkhead between No. 3 hold and the engineroom was slightly buckled or warped.

All present agreed that it was necessary to lower the temperatures of the engineroom bulkhead and decided to achieve this by spraying water against the bulkhead on the side of No. 3 hold. After such spraying, the temperatures of the bulkhead dropped to 120° F. and 135° F. on July 3. Nevertheless, the Master ordered fuel oil in the tanks under No. 3 hold to be shifted because he feared an explosion. The surveyors, the Master, and Kis agreed that it was prudent for the ship to leave Montreal for Philadelphia and it sailed on July 3.

Since the temperatures in all holds and the deep tanks were near or over 200° F., when unloading began in Philadelphia on July 14, some further observations are in order.

When the ship left Detroit on June 29, the temperatures in No. 2 hold and the deep tanks had been steadily declining for several days and (with one exception in the starboard deep tank) were all below 130° F.; they remained below 130° F. until after July 4. The temperatures in No. 4 hold were clearly dropping by the time the ship left Detroit and stabilized under 130° F. on July 3. However, there was a sudden increase in temperatures in No. 2 and No. 4 holds and the deep tanks around July 6 and 7.

When the Gyda arrived in Philadelphia on July 8, she was boarded by representatives of the Coast Guard and National Cargo Bureau. Temperatures in holds 3 and 4 were then quite high and were rising in hold 2 and the deep tanks. The ship was denied permission to dock and ordered to drop anchor at the explosives anchorage.

On July 11, Mr. Midtboe of Norwegian Veritas, representing the shipowner, surveyed the ship's structure and declared the ship unseaworthy with the cargo aboard. On July 14, the ship was permitted to dock, and discharging of the cargo began. Fires resulted and caused substantial damage to both the ship and its cargo.

I.

The Scope of National Cargo Bureau's Undertaking.

Hyman-Michaels engaged the National Cargo Bureau to render certain services in connection with this shipment of steel turnings. The scope of NCB's undertaking is in dispute.

On May 31, Mr. Diamond, Traffic Manager of Hyman-Michaels, telephoned Captain Roscoe, of the National Cargo Bureau, who was in charge of the Bureau's operations in the Great Lakes area and had his office in Chicago. Regarding this conversation, Diamond testified he told Roscoe that he was aware that turnings had a tendency

to heat and asked what NCB could do to help. Diamond further stated that Roscoe told him of the relevant Coast Guard regulations covering turnings, and that NCB would issue an "A Certificate" if the loading was in compliance with these regulations. Diamond said he was also told that the a Certificate would cost between $100 and $150 and that he requested Roscoe to have such a certificate issued to Hyman-Michaels upon completion of the loading.

The following day, June 1, Diamond wrote a letter [5] to Roscoe confirming the telephone conversation of the previous day and outlining the services that Hyman-Michaels wished NCB to perfrom relative to loading the Gyda. [Exhibit Lewis-6]. In this letter Diamond requested NCB to undertake three functions relevant to these suits:

> ". . . As usual, we would like you to make an On Hire Survey on this ship which was built in 1960. In this connection, we would like you to particularly check the deep tanks and ascertain whether the sheathing of the coils is sufficient to withstand the weight of the material which will be loaded into these tanks. Although the sheathing is for the owner's account, and he was aware of the cargo to be loaded, nevertheless, we do not want any damage to occur.
>
> ". . . give . . . an opinion as to the character of the stowage.
>
> ". . . please oversee the loading of this cargo for the purpose of compliance with the rules and regulations of the U. S. Coast Guard and for the protection of the interest of the insurance underwriters."

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5. The letter was dictated by Diamond although it was signed by T. E. Neary, Diamond's assistant.

At the same time, Diamond also wrote a letter[6] to Michigan Foundry informing it that NCB had been hired [Exhibit McDonald-3] and therein stated:

> "The following are some details which we ask you to attend to, or that you should be aware of:
>
> "1. The vessel will be surveyed as to the condition of its cargo spaces by the National Cargo Bureau. This is called an On Hire Survey and is for the protection of the stevedores. We ask that you agree to share this cost with us. Your share would amount to $53."
>
> * * *
>
> "3. The third function of the National Cargo Bureau with reference to this loading will be to see that the cargo complies with the fire and safety regulations of the U. S. Coast Guard and the U. S. statutes. The Bureau will issue its 'A Certificate' if there is compliance. As you know, the principal danger is that of overheating and fire, and we hope this will be prevented. The Bureau will call upon the Coast Guard, should they find it necessary. I hope it will not be necessary."

A copy of the letter to Captain Roscoe was also sent to Michigan Foundry, but a copy of Diamond's letter to Michigan Foundry was not sent to Roscoe or any one else connected with NCB. Since the undertaking by NCB as indicated by such telephone conversation and correspondence was indefinite and uncertain, the court also considered the action of the parties themselves as agreed evidence of what they understood the undertaking to be.

After the Gyda sailed from Muskegon, both Captain Lewis, the NCB surveyor sent to Muskegon, and Captain Roscoe, in Chicago, telephoned Captain Sullivan, the NCB surveyor in Detroit, to warn him that the Gyda was sailing.

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6. Again, the letter was signed by Neary.

Captain Roscoe also instructed him to take temperatures of the Gyda's cargo and to inform the Coast Guard if they exceeded 130° F.

In Detroit, Captain Sullivan did find the temperatures well in excess of the 130° F. and so informed the Coast Guard. Sullivan continued to receive temperature readings of the cargo from the Master, Kis, or the ship's agent by daily telephone reports of temperatures recorded in the ship's log. This procedure continued until June 29 when the ship sailed. During this period, Sullivan not only kept Captain Malloch of the Coast Guard informed of the temperatures reported to him, but also informed Captain Roscoe, of NCB, in Chicago. NCB did not issue its A Certificate until a few days after the ship left Detroit.

The court has concluded from this evidence that National Cargo Bureau's undertaking was limited to activities in Muskegon. It has been argued by Hyman-Michaels, Michigan Foundry, and the ship plaintiffs (the latter two claiming to be third-party beneficiaries of this contract) that National Cargo Bureau undertook to determine when it would be safe for the ship to sail from Detroit, but, with respect to this contention, they have not met their burden of proof. It will be seen that Diamond's testimony, summarized above, and especially the two letters, one to National Cargo Bureau and the other to Michigan Foundry, written the following day, refer only to the *loading* of the Gyda. All of the negotiations and written confirmation of oral discussion appear to have contemplated activities by National Cargo Bureau, relating to the cargo of steel turnings, only at the time of loading—which occurred at Muskegon. The A Certificate itself certified only that the Gyda

> ". . . has been under the inspection of a surveyor . . . of the National Cargo Bureau, Inc., at this port from time to time during the course and in respect of

> the *loading* of cargo herein below specified; that so far as it came under the observation of such surveyor . . ., the stowage of dangerous cargo . . . was in accordance with the regulations of the Commandant, United States Coast Guard. . . .'' [Emphasis added.]

It is true that National Cargo Bureau withheld the issuance of the A Certificate pending a downward trend in the temperatures. Captain Anderson, the Deputy Chief Surveyor of National Cargo Bureau in 1961, testified that this was a general policy of NCB. Interestingly, there is no evidence in this record that Hyman-Michaels was in any way aware of this policy at the time of contracting with National Cargo Bureau. To conclude that National Cargo Bureau must have agreed or undertaken to take temperatures in Detroit or determine when it would be safe for the ship to continue its voyage from there or to issue its A Certificate only upon a downward trend of the temperatures simply because it did in fact take temperatures and withhold the A Certificate cannot be justified on this record. The contract, whatever its terms, was entered into not later than June 1. Diamond wrote two letters on that date indicating his understanding of what he was hiring National Cargo Bureau to do. One of these letters was sent to National Cargo Bureau and the other to Michigan Foundry. In neither of these letters is there anything suggesting that National Cargo Bureau was to do anything relative to the cargo of steel turnings after it was loaded.

The court finds that National Cargo Bureau undertook to send a competent surveyor to Muskegon. The surveyor was required to determine prior to commencement of loading whether the holds of the ship were in proper condition to receive this cargo. He was to observe the loading through its entire course. He did not have to be at the ship continuously during the time it was being loaded, but was required

under the contract to make periodic observations and to take temperatures of the turnings on the dock from time to time. He was also required to observe the material being loaded for debris and other combustible waste in order that he could give an intelligent and informed opinion as to the character of the stowage and to be reasonably available to Kis during the loading process in order to advise him as to whether the regulations were being complied with and whether the cargo was being stowed in a safe manner. If at the end of loading the Coast Guard regulations had been complied with, the Bureau was, of course, obligated to issue its A Certificate.

Nothing further was required of NCB in Muskegon, and it did not undertake any duties relative to the cargo of turnings after the ship left Muskegon.

Michigan Foundry and the ship plaintiffs claim to be third-party beneficiaries of these undertakings of NCB. To be a third-party beneficiary of a contract, one must be within the group of persons that the contract was intended to benefit. The members of this group depend on the intention of the parties to the contract—Hyman-Michaels and NCB.

There is no substantial evidence in this record to establish that NCB intended that its promises were to benefit anyone other than Hyman-Michaels. The evidence relative to Hyman-Michaels' intent is at best ambiguous. Diamond did state in his letter of June 1 to Michigan Foundry, of which NCB did not receive a copy, that the on hire survey was for the protection of the stevedore and that Michigan Foundry was expected to pay one-half of the cost of this survey. However, in the same letter, when Diamond discussed the A Certificate and related duties, there was no indication that Michigan Foundry was to pay for any part of this service. It is true, however, that Michigan Foundry did pay the entire cost of the A Certificate when it was billed for same by Hyman-Michaels in late August 1961.

The court finds that Michigan Foundry has not established by a preponderance of the evidence that it was a third-party beneficiary of the contract between NCB and Hyman-Michaels with respect to the issuance of the A Certificate and related duties or as to NCB's opinion of the character of the stowage.

The court does find and conclude that the shipowner was a third-party beneficiary of the contract between Hyman-Michaels and NCB. *Crumady v. The J. H. Fisser*, 358 U. S. 423, 428 (1959).

II.

National Cargo Bureau Breached Its Undertaking.

To carry out its undertaking, Captain Roscoe sent Captain Lewis to Muskegon to service the Gyda. It is true that Captain Lewis had never dealt with steel turnings before. However, according to his testimony, he had long experience as a ship's officer. He received his Unlimited American Master's License in 1946, had sailed as a Chief Mate for several years, and had been a Master of two vessels for the Moore-McCormick Lines.

Captain Roscoe testified that he instructed Lewis prior to sending him to Muskegon concerning the nature of steel turnings.

> "I pointed out the Coast Guard regulations concerning this type of cargo, read them to him, explained their ability to heat, the fact that temperatures must be taken on the dock." [Tr. 857].

Roscoe also testified that he instructed Lewis concerning the standard procedure of preparing compartments to receive turnings. Specifically, he told Lewis that the sweat battens, all loose wood, and dunnage should be removed from the compartments prior to loading. [Tr. 860].

Lewis was also instructed by Roscoe to inform the Master that turnings had a tendency to self-heat. The Master denies that Lewis ever so informed him. However, both Captain Lewis and Kis testified that Lewis did give the Master this information and the court so finds.

It is clear that Captain Roscoe fully instructed Lewis concerning his duties as to the nature of steel turnings and the hazards involved. NCB cannot be said to have been negligent or in breach of contract in sending Lewis to inspect the loading of the Gyda. The evidence does not sustain the assertion that Captain Lewis was incompetent.

Before loading began on June 14, Captain Lewis inspected the holds of the ship to determine that the sweat battens and all dunnage and debris had been removed from them as required by the Coast Guard regulations. [46 C. F. R. §146.27-100]. He then issued a Certificate of Readiness to Load. Lewis did not require, or advise, that the wood sheathing be removed from along the bulkhead in No. 3 hold which adjoined the engineroom or from the bottom of the deep tanks.

It has been vigorously argued by Hyman-Michaels, Michigan Foundry, and the ship plaintiffs that sheathing and sweat battens are essentially the same, and therefore the regulations require the removal of both. Captain Anderson, the Deputy Chief Surveyor of the National Cargo Bureau in June 1961, testified that the maritime industry recognizes that sheathing and sweat battens are distinct items and have different uses. [Tr. 7742 to 7745, and 7905 to 7911]. Captain Anderson was a ship's officer from 1912 to 1920 and a cargo surveyor from 1920 until his retirement in 1962.

The relevant Coast Guard regulation, 46 C. F. R. §146.27-100, reads in part as follows: "Remove wooden sweat battens and dunnage and clean hold of debris before loading bulk shipments."

In view of the evidence presented, the court concludes that the regulations do not by implication require the removal of sheathing.

Prior to loading, Lewis, in the company of at least the First Mate, Jakobson, also took temperatures in the two piles of turnings from which the ship was to be loaded. To take these temperatures, Lewis had a crane dig several holes, each about four to six feet deep, at selected points in the piles. He and the Mate went into the depressions so created and inserted their thermometers. The temperatures thus found were around 68 to 72° F. Lewis did not take further temperatures on the dock or on the ship until after loading was concluded on June 18.

On June 14, 1961, after Lewis had completed the preloading portion of the draft survey, the on hire survey, had issued the Certificate of Readiness to Load, and had taken temperatures of the turnings on the dock, loading began. It continued on a 24-hour basis until June 18, when it was finished. Erickson Trucking Service provided the cranes, bulldozers, and their operators; but the work was supervised by Mr. Klein, of Michigan Foundry. Mr. Kis, of Hyman-Michaels, was also present observing the loading. Lewis told Klein not to load any hot spots. Klein, in turn, told most or all of the Erickson employees not to load steaming material or material that looked hot. They were told that such material was to be put aside and spread out to cool. The Erickson employees followed these instructions. All of these employees, except Andrews, testified that they encountered hot spots from time to time and set them aside.

There is no direct testimony that turnings with a temperature over 130° F. were loaded onto the ship. However, there is testimony by Captain Hemmick, the ship's agent, and Mr. Weiner, of Michigan Foundry, that they saw steam or vapor coming from the holds of the ship during the load-

ing. Also, Dr. Purdy, an expert witness, testified that in his opinion 1) vapor emanating from a pile of turnings indicated a temperature of over 130° F. in the pile and 2) a temperature in No. 4 hold of 190° F. seventeen and one-half hours after loading commenced indicated that some of the material placed in that hold was over 130° F. when loaded.

On the other hand, Lorne Finlayson, another expert witness, testified that there is no necessary relation between the temperature of the turnings in the ship's hold and the temperature of the turnings on the dock seventeen and one-half hours earlier. He also testified that vapor coming from a pile of turnings does not indicate the temperature of the pile or any part thereof.

The court concludes from all the testimony that plaintiffs have not met their burden of establishing by a preponderance of the evidence that turnings with a temperature of over 130° F. on the dock were loaded into the Gyda.

While it is clear that Lewis did not take any temperatures on the ship during the period of loading, it is conceded that First Mate Jakobson took temperatures in the holds of the ship. The temperatures found are recorded at page 5 of Exhibit Jakobson-3. It is further established that Jakobson took these temperatures at the request of Captain Lewis and that Lewis had told Jakobson that if the temperatures rose above 130° F. to contact him (Lewis) at his hotel in Muskegon. Jakobson testified that he understood from Lewis that 130° F. was some kind of top limit to the Coast Guard and that danger was involved if turnings were over 130° F. On June 15, Captain Roscoe sent Lewis from Muskegon to Cleveland and from there to Buffalo. Lewis did not inform anyone of his departure or where he might be located during his absence.

It is clear from the testimony and Exhibit Jakobson-3 that the turnings soon began to heat. On the 15th, Jakob-

son tried several times to reach Lewis but was unsuccessful. He then prevailed upon the Master to contact Mr. Molvig in New York, who represented the Norwegian underwriters, for advice. It is unclear what the Master was told.

In any case, the loading continued on a 24-hour per day basis until it was completed. On the 17th, the temperatures in holds 2, 3, and 4 were all over 200° F. while the deep tanks had temperatures of 156° F. and 153° F. The First Mate also continued his efforts to contact Lewis during this entire period. Indeed, on Saturday, the 17th, he went to Lewis' hotel where he learned that Lewis had left Muskegon.

Lewis testified that he boarded the Gyda on the morning of the 18th. At that time he completed the draft survey. According to the testimony of both Lewis and Jakobson, Lewis took temperatures of the cargo on the ship and was informed of the temperatures which Jakobson had found during the loading.

Following this conversation it has been established that Lewis attended a conference on the ship among the Master, ship's officers, Kis, and Hemmick. What was said at this conference is in dispute. The conflict in the testimony centers around whether Captain Lewis told the Master and those present at the conference that it was safe to sail or whether he expressed any opinion on this subject.

National Cargo Bureau was required to render an opinion as to the character of the stowage. It is clear from Wright's [7] uncontested testimony that there was no unusual amount of debris in the cargo and the court so finds. There is also no substantial evidence that borings were mixed with turnings. However, the temperatures of the cargo on the 17th and 18th were between 179° F. and 208° F. in all

7. Wright surveyed the cargo in Detroit at the request of Hyman-Michaels Company.

holds about 156° F. in the deep tanks. [Exhibit Jakobson-3]. In view of these high temperatures, the court concludes that Captain Lewis was required to inform the representative of Hyman-Michaels that it was not safe to sail at that time. This he did not do.

From this review of the events in Muskegon, it is clear that National Cargo Bureau was in breach of its contract with Hyman-Michaels Company in several respects. The violation of National Cargo Bureau's undertaking was mainly due to Captain Roscoe's transfer of Captain Lewis from Muskegon during virtually the entire period of loading. No one from NCB was available to make periodic observations of the cargo or take temperatures of the turnings on the dock from time to time. A surveyor was not reasonably available to the representative of Hyman-Michaels during the loading in order to advise him as to whether the regulations were being complied with and whether the cargo was being stowed in a safe manner. Finally, Captain Lewis did not inform anyone on the 18th that it was not safe to sail, considering the then high temperatures in the cargo.

III.

National Cargo Bureau Did Not Undertake to Perform Duties as a Volunteer.

This court has already concluded that National Cargo Bureau had no contractual undertaking with reference to the cargo of steel turnings on the Gyda after it left Muskegon, the place of loading. In spite of strenuous arguments to the contrary, the court has concluded that there is insufficient evidence to support a finding that the National Cargo Bureau undertook any further duties with respect to the Gyda as a volunteer or otherwise.

It is true that Captain Sullivan was instructed by his superior, Captain Roscoe, to take temperatures on the Gyda

while it was in Detroit, and if he found temperatures in excess of 130° F. to report this fact to the Coast Guard. Roscoe also testified that he felt the ship might constitute a seaway hazard if the temperatures of the turnings were over 130° F. Sullivan did as he was instructed. He took temperatures of the cargo on June 20, 21, and 22. After leaving the ship on June 20th, he reported the temperatures he found to Chief Bosun's Mate Sommer. Sullivan testified that in a subsequent conversation between himself and Captain Malloch, of the Coast Guard, Malloch asked him why he had reported the Gyda. Malloch believed that the temperatures would have to be in excess of 300° before he would be concerned. Sullivan testified he told Malloch that his orders were to report to the Coast Guard if the temperatures exceeded 130° F.

At this time it was agreed between Malloch and Sullivan that Sullivan would keep track of the temperatures on the Gyda, although Sullivan did not have to take the temperatures personally.[8] Sullivan was last on the Gyda on June 22. From that time until the ship sailed on June 29 he was informed by phone of the cargo temperatures as recorded in the ship's log each day. Sullivan, in turn, reported these temperatures to Captain Malloch.

There is no evidence in the record to indicate that Sullivan did or agreed to do anything further. There is no evidence that Sullivan advised the Coast Guard to hold the ship in Detroit or to release it, nor is there sufficient evidence that Sullivan undertook to advise the Master, or anyone else, whether it was safe to sail.

Moreover, even if Sullivan had affirmatively permitted the vessel to sail, it cannot be said on this record that such action would have been negligent. This issue is fully dis-

8. It may be noted that NCB is authorized to assist the Coast Guard in administering the Dangerous Cargo Act and the regulations thereunder. 46 C. F. R. § 146.02-6a.

cussed below with regard to the Coast Guard's action in releasing the Gyda.

IV.

The Coast Guard Was Not Negligent in Releasing the Ship in Detroit.

In No. 23964, the ship plaintiffs have alleged that the Coast Guard was negligent in its action regarding the Gyda in Detroit. Basically, the ship asserts that Captain Malloch, of the United States Coast Guard, Captain of the Port of Detroit, held the Gyda in Detroit and then negligently released the ship on June 29. The testimony as to whether the ship was held and the conditions under which it was released are in substantial conflict.

Captain Malloch testified, by deposition, that he did not remember having ever held the Gyda. However, he suffered a stroke prior to the taking of his deposition which seriously impaired his memory.

It has been established that a foreign vessel calling at a United States port is required to obtain a clearance from Customs before leaving. The ship's principal theory is that Captain Malloch asked the appropriate Customs official, Mr. Goodwin, to withhold the Gyda's clearance until the temperatures in the cargo went down.

The Customs records show that the clearance for the Gyda was issued on June 21, the day after the Gyda arrived in Detroit. Mr. Goodwin, who issued these clearances in 1961, testified that he did not remember withholding the Gyda's clearance. He testified further that he did not remember speaking with Captain Malloch or Chief Bosun's Mate Sommer or anyone else connected with the Coast Guard relative to the Gyda.

There is no indication in the ship's log that it was required to remain in Detroit either on direct order of the

Coast Guard or because of its inability to obtain the required Customs clearance, nor is there any other documentary evidence to this effect.

On the other hand, James Boyle, Assistant Manager of Sealanes International, the ship's agent in Detroit, testified that he attempted to obtain the necessary clearance from Customs daily and was unable to do so. He stated that he was advised by Customs that they could not issue the clearance because of the condition of the cargo and because the Coast Guard had requested them not to issue it. At one point, Boyle testified that Goodwin asked him for temperature readings of the cargo.

In 1961, Gerry Liming was a Lieutenant JG in the Coast Guard stationed at Coast Guard District Headquarters in Cleveland. He testified by deposition and stated that he received a call from Captain Malloch in June 1961 wherein Captain Malloch asked if he had authority to detain the Gyda because of a heating condition in her cargo. Unable to answer this question on his own, he called Captain Hudson of the Coast Guard in Washington. Lt. Liming then relayed the answer received from Captain Hudson in Washington to Captain Malloch in Detroit to the effect that Malloch had such authority.

The Gyda's log shows that loading was completed in Detroit at 3:50 p.m. on June 21 and that departure was delayed because of continued heating of the turnings. The log for June 22 indicates that departure was further delayed for the same reason. On the 23rd, the ship left the pier and anchored in the stream. The log also notes that the vessel was delayed because of high temperatures and that it was awaiting further orders. Similar entries were made each day thereafter until the afternoon of the 29th when the ship sailed.

Captain Sullivan, of the National Cargo Bureau, first boarded the Gyda on June 20 shortly after its arrival in

Detroit. During the time he was on the ship he took temperatures of the cargo and found them to be as high as 180° F. He testified that after leaving the ship he contacted Chief Bosun's Mate Sommer of the Coast Guard at 6:10 p.m. and informed him of the temperatures. Sommer, in turn, testified that he notified Captain Malloch about the heating problem on the Gyda and stated that Mulloch told him to keep track of the temperatures. Sommer made an informal visit to the ship on the evening of June 20.

Sommer testified that the next morning, June 21, he boarded the ship and was there when Sullivan took further temperatures of the cargo. He stated that the temperatures found were as high as 170° F. and that he reported these to Malloch.

Sullivan testified that he consulted with Captain Malloch on June 22. At that time Sullivan stated that he agreed to keep the Coast Guard informed of the temperatures found on the Gyda. He said that Captain Malloch told him that it would be all right to take these temperatures from the ship's log rather than take them personally. It may be remembered that at this time the First Mate Jakobson was taking temperatures three times a day. Sullivan also said that the temperatures of the cargo were subsequently reported to him by either the Master, Kis, or the ship's agent. Things continued in this fashion until June 29.

Raymond Ballard, local counsel for the ship in this action, also testified. He stated that he was retained on June 28, 1961, by certain insurance companies having coverage on the ship and was asked to determine the status of the ship. He stated that he was soon in contact with Captain Malloch and that Malloch told him that he was holding up the Gyda's clearance because temperatures in its cargo were high and he considered them dangerous.

Ballard testified that he next contacted Captain Malloch on the morning of the 29th and at that time Malloch told him that the temperatures were coming down and that the Gyda might be permitted to sail later that day. Ballard also testified that at 3:35 p.m. on the 29th, Captain Malloch informed him that he, Captain Malloch, had approved the Gyda for sailing to Philadelphia. He also stated that at 4:00 p.m. Mr. McCarthy, of Sealanes, called him and stated that Captain Johansen was in his office to get the clearance to sail.

Captain Sullivan, of NCB, testified that he talked to the Master and Kis by phone at 3:00 p.m. on June 29, at which time he was given the temperatures of the cargo recorded that day and was informed that the ship was sailing. He stated that he then called Roscoe in Chicago to determine if he was to do anything further on the Gyda before it sailed. Sullivan said that Roscoe told him that he had no further duties on the ship. After this conversation, Sullivan made the following entry in his notebook: "Called Capt. Roscoe—O. K. re sail per Cargo Bureau at 1510." [Exhibit Sullivan-5H].

The ship plaintiffs, Hyman-Michaels, and Michigan Foundry argued vigorously that this notation is strong proof that NCB did in fact hold the ship and then release it. The court rejects this interpretation of Sullivan's entry and finds that the notation was merely a record of Roscoe's statement that, in view of the Master's decision to sail, Sullivan should not be concerned further with the Gyda.

Captain Sullivan also testified that he called Captain Malloch at 3:28 p.m. on June 29 to determine "whether or not what Kis told me was true, that he [the Master] was sailing." [Tr. 3066]. He also testified that Malloch told him that the vessel was sailing; that Malloch thought the temperatures had cooled down, and that he had nothing to

do with the vessel. [Tr. 3066]. Sullivan then noted in his notebook: "1528—O. K. from Captain Malloch USCG." [Exhibit Sullivan-5H].

In view of all the testimony,[9] this court has concluded that Captain Malloch did detain the Gyda and that he did this by requesting Mr. Goodwin, of Customs, to withhold delivery of the ship's clearance. The court also concludes that Captain Malloch decided to release the ship at some time prior to 3:00 p.m. on the afternoon of the 29th. The court credits Captain Sullivan's testimony that he spoke with the Master and Kis by phone at 3:00 p.m.; that they called from Sealanes' office and that Kis told him (Sullivan) that he had been in touch with the Coast Guard and they said the temperatures were down enough to sail.

The court has also concluded that Captain Malloch was not negligent in deciding to permit the ship to sail on June 29. Sullivan testified that he received the temperatures of the cargo, after June 23, from the ship's log via telephone and that he relayed these temperatures to the Coast Guard. Temperatures of the cargo were taken three times a day by the First Mate. It is agreed that the temperatures thus found are accurately recorded in Jakobson-4.

A careful examination of this exhibit indicates that the temperatures in all holds were showing a significant downward trend by June 29. It is clear that the temperatures in No. 2 hold showed a marked decrease beginning on June 26. The same is true of both deep tanks. The temperatures in No. 4 hold began to show a marked drop late on June 27. The temperatures in No. 3 hold showed some decrease on the 29th, but this decrease was not of

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9. It is also significant to note that under the terms of the voyage charter [Exhibit Diamond-4, §§ 7 and 19], Hyman-Michaels was permitted 26 laytime days; that for each "day on laytime saved" Hyman-Michaels would receive a credit of $400 and would be charged a demurrage of $800 per day over the allowable maximum of 26 days.

the same magnitude as that of the other holds. Thus, it is clear that Captain Malloch was aware that there was a very marked decrease in temperatures in all holds except No. 3 and some decrease of temperatures in No. 3.

Also, while Captain Malloch did not know about Captain Meno's inspection of the cargo or the results of that inspection, Captain Meno has testified that holds 2 and 4 and the deep tanks presented no problem. After his inspection he was concerned only with hold No. 3. As to that hold, he stated that it was unstable. He testified that he had found an oil haze and generally higher temperatures in No. 3 than elsewhere. After leaving the ship at about noon on the 29th, he found that arrangements could be made at Nicholson Terminal to unload the cargo in No. 3 hold if that were desired and informed the Master of that fact when he returned to the ship early in the afternoon.

It appears to the court that Captain Meno concluded and informed the Master that while the ship was in no *immediate* danger, and could probably sail as far as Port Weller, it would be better practice to discharge the cargo in No. 3 hold. Captain Meno also advised the Master to carry clam buckets with him if he elected to sail without unloading No. 3 hold.

In view of all this evidence, this court finds that Captain Malloch was not negligent in deciding to permit the Gyda to sail as far as Philadelphia.

V.

The Negligence of the Master.

The Master testified that after sailing from Detroit, the temperature in the after-end of No. 3 hold went up and a different kind of smoke appeared. Consequently, he stopped in Montreal to have the cargo checked by a sur-

veyor. George Hayes, a marine surveyor, representing the ship's underwriters, boarded the Gyda on July 2. Edward Edwardson, a marine engineer, who represented Hyman-Michaels and Lakes Shipping, boarded the ship at the same time.

Hayes testified that he found the wood sheathing at the after-end of No. 3 hold smouldering, and that dense smoke was coming out of No. 3 hatch. He also testified that thermometers on the engineroom side of the bulkhead adjacent to No. 3 showed readings of 180° F. to 190° F. along part of the bulkhead.

Hayes also testified in part, as follows:

> "A: There was a small quantity of a white powder, which I now understand perhaps was soda ash, which was mixed with the cargo, and we tried to dig into this commodity knowing it was difficult, but at one point a small fire originated of about one foot in diameter, but it was extinguished.
>
> "Q: You mean while you were digging into the cargo?
>
> "A: Right.
>
> "Q: Did you make any observation of smell?
>
> "A: There was a very strong smell of burning wood in the after-end of that hold, burning or scorching wood." [Tr. 3136-3137].

Edwardson testified to essentially the same thing. He also observed that in view of the difference in temperatures of the starboard and port sides of the bulkhead between hold No. 3 and the engineroom, he felt they were dealing with hot spots or a hot spot in No. 3 hold. Only a part of the bulkhead was especially warm.

Hayes also stated that the Master, Edwardson, Kis, and himself agreed that the temperature of the No. 3 bulk-

head had to be reduced in view of a slight buckling and that this should be done by hosing it down on No. 3 side. He said that all concerned agreed the bulkhead should be hosed every two hours. Edwardson testified to the same thing. The Master ordered that the fuel oil stored under No. 3 hold be pumped into other tanks because of his fear of an explosion.

Consequently, water was placed on the bulkhead periodically beginning July 2. On July 3, the temperature of the bulkhead was down to 120° to 135° as registered on the engineroom side. Hayes testified that all indications of smoke had vanished by that time.

On July 3, according to Hayes, there was a conference between the Master, Edwardson, Kis, the ship's agent and himself and that it was mutually agreed that "it would be prudent for the vessel to sail. . . ." [Tr. 3129]. He testified that one of the reasons he concurred in this judgment was that there were many ports of refuge on the route to Philadelphia. This testimony was corroborated by Edwardson and the First Mate Jakobson.

Hayes also testified:

> "Q. From your experience as a marine surveyor, was the Master free to disregard the recommendation of interests on board if he saw fit?
>
> A. Yes." [Tr. 3143].

The First Mate testified that after leaving Montreal, the Master ordered that water be applied to the entire cargo three times a day. He also testified that water was so applied to holds 2, 3, 4, and the deep tanks. Although the Master disputed this testimony of Jakobson, the court credits the First Mate's testimony. A review of the temperatures recorded in Exhibit Jakobson-4 demonstrates

that the temperatures in the deep tanks, for example, had stabilized between 100 and 110° F. by the 29th of June. They remained at this level until July 8 when suddenly the temperature increased to 130° F. and continued to rise steadily until they got up to 210° on July 12. A similar trend is evident in holds 2 and 4. In view of this pattern of descending temperatures, stabilization, and then a very sharp and otherwise unexplained rise, the court has concluded and finds that water was applied to the entire cargo after the ship left Montreal upon orders of the Master despite repeated warnings to him that it was dangerous to do so.

The court therefore finds and concludes that the Master was guilty of negligence in (1) allowing water to be applied to No. 3 hold in Montreal, (2) in sailing from Montreal under the circumstances then existing and (3) in applying water to the cargo after the ship sailed from Montreal.

VI.

Proximate Cause.

NCB had no right to detain the ship or require that it be unloaded. However, it did have a duty to inform Hyman-Michaels that it was not safe for the ship to sail from Muskegon and to ascertain compliance with the relevant Coast Guard regulations. This court has already determined that the regulations were obeyed. There is no sufficient evidence to establish that hot turnings were loaded onto the ship and the court has held that the 130° F. maximum in the regulations (46 C. F. R. § 146.27-100) does not apply to turnings properly on the ship.

In evaluating the causal relationship between NCB's failure to give its opinion as to the character of the stowage and the fire which occurred in Philadelphia, it is essential to examine the events in Detroit and Montreal.

Every witness who examined holds 2 and 4 and the deep tanks after the temperatures began to drop on June 27 testified that there was no difficulty with the turnings therein. The temperatures taken by the First Mate and recorded in Exhibit Jakobson-4 substantiate these observations. The temperatures in these holds stabilized at or below 130° F. between June 27 and July 3. Consequently, the cargo in holds 2 and 4 and the deep tanks was in fact safe at that time. The court finds that the application of water to the turnings on the Master's orders after the ship left Montreal renewed the heating reaction and this was the sole proximate cause of the fire which occurred in holds 2 and 4 and the deep tanks of the ship at Philadelphia.

Hyman-Michaels knew that the cargo in No. 3 hold was unstable and presented a hazard not later than June 26, the date Mr. Wright examined the cargo in Detroit at their request. The court has already found that Wright advised both Kis and the Master that the cargo would not cool on the ship.

On June 29, Captain Meno also warned the Master in Detroit that No. 3 was unstable and that it would be better practice to unload it. Meno even determined and informed the Master that arrangements could be made to unload No. 3.

In short, Hyman-Michaels and the Master knew everything in Detroit that NCB could have told them in Muskegon. The heating problem could have been remedied as easily in Detroit as in Muskegon. No one has claimed that damage was suffered in Detroit.

For these reasons, the court concludes that the breach of contract by NCB in Muskegon was not a proximate cause of the fire in No. 3 hold in Philadelphia. NCB had undertaken only to warn or advise. Once aware of the situation, it was up to the Master and Hyman-Michaels to decide on

what action to take. They did become aware of the situation in Detroit, took a calculated risk, and lost.

Even if one were to accept the argument of Hyman-Michaels and the ship that the effect of NGB's breach of contract continued beyond Detroit, the court concludes that the Master's negligence in adding water to the cargo at regular intervals at and after sailing from Montreal constituted an intervening cause and broke the previously existing chain of causation.

The Master stopped in Montreal because the wood sheathing at the after-end of No. 3 was smouldering and emitting substantial quantities of smoke. When the surveyors at Montreal attempted to disturb the surface of the cargo, a small fire originated of about a foot in diameter at one point. This fire was easily extinguished. Damage to the structure of the ship in the form of a slight buckling of the bulkhead between No. 3 hold and the engineroom was discovered, and the Master was sufficiently concerned with the dangers of explosion to order that the fuel oil stored under No. 3 hold be pumped into other tanks. Finally, he permitted water to be sprayed on the bulkhead between No. 3 and the engineroom in such a way as to get on the cargo and applied water to the entire cargo after sailing from Montreal.

The Master was informed by Grundvig in a letter received by him in Antwerp before leaving for Muskegon that turnings "is a somewhat difficult thing, because of possible fire hazard." [Exhibit Johansen-1, p. 4].

The Master testified that he knew he should not apply water to the cargo of turnings. Captain Lewis had told him of the danger of spontaneous combustion when dealing with turnings, and the Master had discussed the characteristics of turnings with Kis and Meno. The addition of water to No. 3 hold substantially accelerated the heating reaction of

the turnings therein and led directly to the fire encountered in Philadelphia.

Hyman-Michaels and the ship plaintiffs have argued strenuously that, if the cargo had been unloaded in Montreal, much the same condition of fire would have resulted there as did result in Philadelphia two weeks later. To reach this conclusion, they have placed virtually exclusive reliance on Hayes' testimony of the small fire in the cargo.

Finlayson, an expert witness, has testified that in his opinion such a general conflagration as occurred in Philadelphia would not have taken place in Montreal. He also testified that while there might have been some fire in Montreal it could have been easily controlled. Moreover, Finlayson testified that adding water to the cargo in No. 3 would substantially accelerate the heating reaction.

The court has found that water was applied to the entire cargo after the ship left Montreal on the Master's orders as previously stated and finds that this application of water substantially accelerated the heating reaction which continued to generate further heat for about eleven days which eventually resulted in the fire damage in question. The court therefore concludes that Hyman-Michaels and the ship plaintiffs have not met their burden of proving that a general fire would have occurred in No. 3 hold in Montreal if the turnings therein had been unloaded at that time.

The court therefore finds and concludes that no breach of duty or undertaking on the part of National Cargo Bureau was a proximate cause of the fire damage to the ship.

VII.

Conclusions of Law.

In view of the above findings of fact, there are few legal issues to be resolved. The court reaffirms and incorporates by reference its rulings made during the trial, including,

but not limited to, the invalidity of the exculpatory clause in NCB's A Certificate, the applicability and scope of the Ryan warranty of workmanlike service, and unavailability of contribution in admiralty non-collision cases. With respect to the remaining conclusions of law, each case will be discussed separately.

No. 23990 (*Skibs A/S Gylfe et al. v. Hyman-Michaels and Lakes Shipping v. National Cargo Bureau,* third-party defendant).

Hyman-Michaels claims that it violated the Carriage of Goods by Sea Act, 46 U. S. C. § 1304(6), in that it did not adequately inform the Master of the Gyda concerning the "nature and character" of steel turnings prior to loading. However, this court has found that the Master was aware of the hazard presented by steel turnings prior to loading; therefore, the Carriage of Goods by Sea Act was not violated.

Hyman-Michaels[10] also claims that the relevant Coast Guard regulations were not complied with, and it was accordingly liable to the ship for violating Section 170(7) of the Dangerous Cargo Act, which commands that the Coast Guard regulations shall be obeyed. Hyman-Michaels then claims that NCB is liable to it because NCB was hired to assure compliance with these regulations. This contention, too, has been put to rest by the court's finding that the Coast Guard regulations were complied with.

It is also argued by Hyman-Michaels that the Certificate of Readiness to Load and the A Certificate constitute deceptive shipping papers. 46 U. S. C. § 170(10). The court has concluded that neither of these documents constitutes a "shipping paper" within the meaning of Section 170(10). The term "shipping papers" is defined at 46

10. Hereafter, reference to Hyman-Michaels Company also includes Lakes Shipping and Trading Corp., its wholly owned subsidiary.

C. F. R. § 146.03-29, 146.05-12, 146.05-13, and 146.05-14. Even if the challenged documents were shipping papers, the court has concluded that they were not deceptive. Moreover, the A Certificate was never issued until the ship was well on its way and then it was not issued to the ship, and the Master never saw it.

The court has previously determined that the Ryan warranty of workmanlike service attached to NCB's undertakings and that some of these undertakings were breached. However, this does not aid Hyman-Michaels, since this court has found that NCB's breach of its contractual undertaking was not a proximate cause of the damage suffered by the ship in Philadelphia. Hyman-Michaels' claim against NCB must fail.

No. 23991 (*Skibs A/S Gylfe et al. v. Michigan Foundry v. National Cargo Bureau*, third-party defendant).

Michigan Foundry alleges that it violated the Coast Guard regulations relating to the loading of steel turnings and that it is a third-party beneficiary of the contract between Hyman-Michaels and NCB. This court has found that the regulations were not violated during loading and that Michigan Foundry is not a third-party beneficiary of NCB's undertaking to insure compliance with the Coast Guard regulations and to give an opinion as to the character of the stowage. It follows that Michigan Foundry is not liable to the ship plaintiffs for violating Section 170(7) of the Dangerous Cargo Act and that it has no basis for claiming indemnity from NCB.

Michigan Foundry also claims that it was negligent and in breach of contract during the loading in that undue foreign matter and borings were loaded on the ship and that this provides a basis for recovering over against NCB. This court has already found that it has not shown by a preponderance of the evidence that undue foreign matter or debris or borings were loaded onto the Gyda.

Michigan Foundry's claim for contribution must fail as a matter of law since contribution is not available in admiralty non-collision cases. See *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952).

Michigan Foundry's claim against National Cargo Bureau must fail for the reasons stated above.

Admiralty No. 25386 (*Skibs A/S Gylfe et al. v. National Cargo Bureau v. Hyman-Michaels Company, Lakes Shipping, Michigan Foundry, and Erickson Trucking Service*, third-party defendants).

This court has already found that the ship was a third-party beneficiary of National Cargo Bureau's undertaking and ruled during trial that the Ryan warranty of workmanlike service applied to this undertaking. Although the undertaking was breached in Muskegon, the lack of proximate cause between this breach and the damage suffered in Philadelphia precludes recovery by the ship.

The ship plaintiffs have claimed that National Cargo Bureau is liable to it not only because of the breach of its contractual undertaking but also on the basis of negligence. The difficulty with this position is that the ship plaintiffs have been unable to establish any duties which National Cargo Bureau had with respect to the shipowner that are separate and distinct from those arising from the contract between NCB and Hyman-Michaels. Moreover, any breach of duty in Muskegon would lack the necessary causal relationship to the damages suffered by the ship for the reasons set forth earlier in this opinion. For these reasons, the ship's suit against National Cargo Bureau must fail, and consequently, NCB's third-party action against Hyman-Michaels, Lakes Shipping, Michigan Foundry, and Erickson Trucking Service must also fail.

Admiralty No. 23964 (*Skibs A/S Gylfe et al. v. United States*):

The central issue presented in this suit is whether the Coast Guard was required to hold the Gyda in Detroit and if so under what circumstances it could release the ship. The ship plaintiffs have argued that the regulations at 33 C. F. R. §§ 6.04-8, 6.12-1 and 6.14-1 give the Coast Guard, in the person of the Captain of the Port, the right to detain any vessel "whenever it appears to him that such action is necessary in order to secure such vessel from damage. . . ." (33 C. F. R. § 6.04-8).

The Government asserts that the regulations in 33 C. F. R. relied upon by the ship are not relevant in this proceeding since they were promulgated under the authority of 50 U. S. C. § 191. This section relates to the regulation of anchorage and movement of vessels during a national emergency. The Government asserts that the authority under this section can be used only to prevent sabotage and similar activities.

It is true that the regulations under discussion were issued in Executive Order No. 10173 of October 20, 1950, which made a finding that the security of the United States was endangered by reason of subversive activity. This executive order is still in effect. There is nothing in the statute or regulations which would support the very narrow interpretation contended for by the Government in this case.[11] The apparent purpose of Congress and of the President was to provide for the continued functioning of the ports and shipping therein during time of peril. The operation of a port and the safety of shipping in it are endangered by fire resulting from spontaneous combustion as well as by the saboteur. The court concludes that the regulations relied upon in 33 C. F. R. permit but do not require the Captain of the Port to detain a ship with hot turnings. The court also concludes that 46 U. S. C. § 170(12)

11. Also, compare 33 C. F. R. §§ 6.04-8, 6.12-1, 6.12-3, 6.14-1, and 6.14-2 with Section 6.16-1 and 6.16-3.

and 46 C. F. R. § 146.02-6, placing the primary duty for enforcing the Dangerous Cargo Act on the Coast Guard, give the Coast Guard authority to detain a ship at least long enough to determine if the Dangerous Cargo Act has been violated.

The court has found that Captain Malloch, Captain of the Port of Detroit, did, indeed, detain the Gyda. He did this by requesting Customs not to deliver the required Customs clearance to the Gyda. The court has also found that Captain Malloch released the ship on June 29 after the temperature in all holds except No. 3 had declined substantially and the temperatures in No. 3 had begun to decline. There is no statute or regulation which states how long the Coast Guard must detain a vessel once it has elected to do so. In this case, the court has found that Captain Malloch was not negligent in releasing the Gyda. Since he was not negligent in releasing the ship, and there is no regulation requiring him to hold it longer than he did, the ship's suit against the United States must fail.

The court invites the submission of any revised or additional findings of fact and conclusions of law not inconsistent with this opinion. Appropriate forms of judgment shall be presented.

RALPH M. FREEMAN,
Ralph M. Freeman,
Chief United States District Judge.

Dated: Detroit, Michigan
September 4th, 1969.

ORAL OPINION OF THE DISTRICT COURT.

THE COURT: All right.

After the plaintiffs had rested, both in the civil jury case and in the non-jury admiralty cases, the defendants proceeded to offer testimony and a few days ago, I have forgotten the exact date, while the defendant Hyman-Michaels was offering testimony by its witnesses, the defendants Hyman-Michaels, Michigan Foundry, and the third-party defendant Erickson Trucking Company, entered into, or, to be more exact, resumed settlement negotiations with the plaintiffs and, as a result, the plaintiffs in the cargo case, 24638, the jury case, reached a settlement with the defendants Hyman-Michaels and Michigan Foundry. As a result of that settlement, Michigan Foundry dismissed its third-party complaint as to the Erickson Trucking Company and Hyman-Michaels dismissed its cross complaint against Michigan Foundry.

These settlement negotiations took place in the absence of the third-party defendant National Cargo Bureau, although National Cargo Bureau was informed several times that settlement negotiations were going on, but they were not permitted to be present during the settlement negotiations.

Having been so advised of the settlement negotiations, it is very clear that the National Cargo Bureau had notice that settlement was being discussed and was specifically notified afterward that settlement had been reached, as I have already mentioned. In this suit, that is, the jury case, the civil case, both defendants Hyman-Michaels and Michigan Foundry have filed a third-party complaint against National Cargo Bureau, which, in and of itself, I think, constitutes notice to National Cargo Bureau that the defendants were asserting a claim of indemnity and also contribution against the National Cargo Bureau.

In any event, a settlement having been effected between the plaintiffs and the defendants and the third-party defendant Erickson, the trial of this case resumed in the absence of counsel representing the cargo plaintiffs.

The defendant Hyman-Michaels offered testimony of several witnesses, and at sometime during the offering of this testimony, after the settlement had been made, the issue arose as to whether the defendants Hyman-Michaels and Michigan Foundry would be required to prove actual liability to the plaintiffs in order to assert their claim of indemnity against the National Cargo Bureau, or whether the defendants needed only to prove a potential liability and that the settlement was reasonable.

The resolution of this issue is probably one of the most difficult questions that I have ever had to decide during the trial of a case. Unfortunately, I don't feel that I can take as much time as I would like to take in order to make this decision. The jury is here and I feel obliged to decide this issue and get on with the trial.

In st. ing the issue, I think I have, in effect, stated the position of the defendants and the third-party defendant. In other words, the defendants Hyman-Michaels and Michigan Foundry contend that, in the present posture of this trial, in this case, they need only prove a potential liability on their part to the plaintiffs and that the settlement was reasonable as a basis for proceeding against the third-party defendant National Cargo Bureau, on the third-party complaint.

On the other hand, National Cargo Bureau contends that the defendants are required to prove actual liability on their part to the plaintiffs in order to proceed on the indemnity theory.

Defendant Hyman-Michaels has submitted a written memorandum of cases and has also cited some other cases on oral argument. National Cargo Bureau has cited cer-

tain cases to the Court in support of its position and I have read, I think, all of these cases, or nearly all of them.

First of all, the defendants point out that the underlying principle in support of the defendants' theory is the case of St. Louis Beef Company v. Maryland Casualty Company, 201 U. S. 173, a 1906 decision of the Supreme Court, an opinion written by Mr. Justice Holmes, where he said:

> "But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution."

Now, this principle has been applied in numerous cases ever since that time.

Another case relied on by the defendants is that of Chicago, Rock Island and Pacific Railway Company v. United States, 220 F. 2d 939, a Seventh Circuit case decided in 1955. In that case, an employee of the railroad was injured by a mail sack thrown by an employee of the United States, and the injured employee filed a claim against the railroad. The railroad notified the Government of the claim several weeks after the accident and injury and requested the United States to assume liability, which the Government refused. Later, the railroad settled the claim of the employee made against it and then sued over against the Government for indemnity. The Court in that case held that the railroad need only show its potential liability to the injured employee.

And in that case the Court said "Plaintiff at the time it made settlement with the employee did not have the benefit of such finding." That is the Trial Court finding that the plaintiff railroad in that case and its employee "Were in the exercise of due care and caution" and the Court continues: "It was required at that time to use foresight rather than its hindsight in evaluating the situation

relative to its probable liability. Taking into consideration that which we all know, that is, the almost insurmountable difficulties attending the defense by a railroad in an action for damages under the Federal Employers Liability Act, it cannot be said that the plaintiff made other than a fair and reasonable settlement of its potential liability. To have resisted settlement to that point of a jury verdict would have been sure folly under the circumstances."

Another case upon which the defendants placed considerable reliance is the case of Damanti, D-a-m-a-n-t-i v. Inger, I-n-g-e-r, 314 Fed. 2d 395. This is a 2nd Circuit case cited in 1963.

This was a case where a longshoreman sued the defendant ship who, in turn, filed a third-party complaint against the present defendant, the stevedore who was the plaintiff's employer.

Plaintiff and the principal defendant, the ship, agreed to a settlement, made a settlement just before argument to the jury and I think after all the evidence was concluded. The third-party defendant, the stevedore, was given an opportunity to offer defense at this point and refused.

The plaintiff and the defendant ship, nevertheless settled and the ship then continued with its action on against the stevedore on a third-party complaint and in special interrogatories, the jury found first: That the settlement of the plaintiff's claim by the defendant of $30,000.00 was reasonable and, second: That defendant was not liable to the plaintiff and, third: That the third-party defendant, the stevedore company, was negligent. The Trial Court set aside the jury verdict against the stevedore and granted a new trial.

At the second trial the Court dismissed the case as to the stevedore, apparently on the theory that in the jury finding it was not liable to the defendant ship and barred recovery over.

The Court of Appeals reversed the decision and ordered judgment to be entered for the ship in the third-party action and in its opinion said "The ship need not establish that it was in fact liable to the claimant so long as the claimant's injury on the ship and a potential liability on the facts known to the ship are shown to exsit, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the ship."

It went on further to say that the Court—I don't have the case here, but the Court held that it was a potential liability and that was all that was required to be established.

Now, in the case of California Stevedore and Ballast Company v. Pan-Atlantic Steamship, a 9th Circuit case decided in 1951 and reported in 291 Fed. 2d 252, a suit was filed by the plaintiff against what he thought then was the ship owner for injuries sustained on the ship and he later learned that someone else owned the ship and that the defendant, Pan-Atlantic, was the real owner and after investigation, Pan-Atlantic Company decided to settle the claim, even before formal suit was brought against it. But, at the time of the settlement, Pan-Atlantic did tender the defense of the action to the indemnitors and the indemnitors refused the tender.

Nevertheless, the ship owner went ahead with the settlement and asked the indemnitors to prove the reasonableness of the settlement and there was no response to that.

The ship concluded the settlement and then brought suit against the stevedore. The Court, in that case, held that the ship owner need only to establish its potential liability to recover in its action over.

Now, another case cited to the Court by the defendant, which is not an admiralty case, was the case of Jennings v. United States, 4th Circuit, decided in 1967, 291 Fed. 2d 893.

This was an automobile case where the plaintiff sued the driver who was defended by his insurer and during the trial, a settlement was effected. Then, sometime later, two years later as a matter of fact, the insurance company sued the United States for indemnity, alleging negligent construction of the highway where the accident occurred.

The insurance company stipulated there was no negligence on the part of its insured and the Government stipulated it was negligent and the amount of the settlement in the principal action was reasonable. The Government had been given no notice whatsoever by filing of the original action by the injured plaintiff and the Trial Court, in that case, held that the insurance company had to establish its insured's negligence since there had been no notice given of the pendency of the original action or the settlement negotiations. It held, the Trial Court, and affirmed on appeal, and I would like to quote to some extent in support of the conclusion that I have reached here.

The Court held in effect this: "If the indemnitor was to be bound by the issues adjudicated in the original action, he must be given notification of that action and an opportunity to defend."

And then the Court went on to say "Where an indemnitor is notified and can participate, and indeed, may control the litigation, he is precluded from contesting the indemnitee's liability at the subsequent indemnity action" and also said that "Notice and an opportunity to defend are the indemnitee's due process elements and the Court went on to say "The rule we adopt is not to discourage settlement, it only recognizes the unquestionable duty to serve notice. If the indemnitee does not elect to participate in the action and reject settlement, there is no prejudice to the indemnitee who can recover all monies paid under the compulsion of a judgment entered against him.

I may be taking a lot of time to decide this issue but I want the record to indicate that I have reviewed the cases and authorities cited by counsel, and I hope you will bear with me until I get through.

I turn now to Professor Moore's work, Moore on Federal Practice, Volume 3, which covers Rule 14 of the Federal Rules of Civil Procedure, and that Section 14.13, Professor Moore says,.

> "As originally promulgated, Rule 14(a) contained a sentence reading:
>
> > 'The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff.' "

The quotation is from the rule as it once existed.

Then Professor Moore goes on to say with respect to that part of the rule which was, I think, later deleted.

> "This sentence was stricken by the 1946 Amendment of the Rule, 'not to change the law,' the Advisory Committee said, 'But because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rule to state the effect of a judgment.' "

Rule 14(a) provides that,

> "The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim."
>
> "This sentence, the Advisory Committee stated, 'protects the impleaded third-party defendant where the third-party plaintiffs fails or neglects to assert a proper defense to the plaintiff's action' as a result, the

third party continues to be bound by the adjudication of the main claim."

Then at this point the Cumulative Supplement, 1967 Cumulative Supplement, at page 61 of Professor Moore's work refined this. This is the statement of the author.

"Where defendant and plaintiff settle the controversy between them, the third-party action could continue although the settlement would not be binding on third-party defendant; the issue on liability would be whether defendant was reasonable and prudent in making the settlement."

Now at that point and in support of that statement the case of Moses-Ecco Company v. Roscoe-Ajax Corporation, District of Columbia, Circuit case, decided in 1963 and reported 320 F. 2d 685 held, in that case the plaintiff on the first trial got a jury verdict of $120,000. A mistrial was declared and then near the end of the second trial the defendant settled with the plaintiffs for $45,000. At the time of the settlement the defendant asked the third-party defendant to assume the defense. Moses-Ecco, the third-party defendant, agreed that the amount of the settlement was reasonable but disputed the principal defendant's liability to the plaintiff. Moses claimed that Roscoe-Ajax had to prove actual liability to plaintiff in order to recover over against Moses in the indemnity action. The Court in that case held that under its contract the third-party defendant was required to indemnify Roscoe even against its own negligence, and that Roscoe did not lose this right to indemnification simply because it settled the plaintiff's claim.

The Court went on to in effect state that at the trial of the indemnity claim it is not necessary to establish actual liability of Roscoe to the plaintiffs and that the issue before

the trial judge was merely one of whether Roscoe-Ajax was reasonable and prudent in making the settlement.

In that case, the plaintiff's claim rests upon a question of law which was still open in that jurisdiction, as I remember it, the right of an injured workman to sue a third party. In any event, in those circumstances, the Court held that a settlement payment made when the law was uncertain could not be successfully attacked on the basis of any subsequent resolution of the uncertainty.

Pretty much the same effect as the case of West Coast Terminal v. Luckenbach Steamship Company, 349 F. 2d 568 which was also a seaman's case, an admiralty case, in which the defendant in making settlement with the injured seaman tendered the defense to the third-party defendant or the indemnitor. The Court held that under those circumstances only two issues remained for adjudication and that was whether it was made reasonably and in good faith and, secondly, whether there was a breach of an indemnity contract by the stevedore which proximately caused the seaman's injury.

Now I have also examined cases submitted to the Court by National Cargo Bureau, including a case of Tugboat Indian Company v. Rederi, a Pennsylvania case reported in 5 Atlantic 2d, 153 in which the Tugboat settled with the plaintiff taking an assignment of rights, but at the commencement of the original action the Tugboat demanded that Rederi and another company undertake defense of the suit and wrote their attorney prior to settlement, giving notice of the proposed settlement and reserving the right of action by way of subrogation. In that case the Tugboat received a jury verdict against Rederi for $2,500 but the trial Court granted a motion for judgment n.o.v., and this judgment so entered was affirmed by the Pennsylvania Court of Appeals or the Supreme Court, whichever it is there.

The Court stated,

> "To recover indemnity where there has been such a voluntary payment, however, it must appear that the party paying was himself legally liable and could have been compelled to satisfy the claim."

I will not take the time to discuss the other cases submitted to the Court by National Cargo Bureau. They are pretty much to the same effect as the Indian or the Tugboat Indian Company case.

In most of these cases, if not all of the cases, where the Court applied to test which the defendants here contend, that is, that only a showing of potential liability rather than actual liability is all that is required and that proof of the settlement was reasonable, the indemnitor has not only received notice but has been notified of settlement or but the defense of the action has actually been tendered.

Now that was not done in this case. National Cargo Bureau had notice, of course, but the defense of the plaintiffs against Hyman-Michaels and Michigan Foundry was not tendered to National Cargo Bureau.

Now I have already mentioned, if not read from the relevant portion of Rule 14 of the Federal Rules of Civil Procedure, Rule 14(a), the sentence which states, the one provision of that rule which reads as follows:

> "The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim."

In deciding this issue I am called upon to weigh the admitted, to weigh the policy of the admitted desirability of settlement of lawsuits against the right of the so-called indemnitor or third-party defendants here, National Cargo

Bureau, to assert defenses specifically given to it by Rule 14.

Now National Cargo Bureau was not asked at any time to stipulate as to whether or not the settlement was reasonable. National Cargo Bureau did refuse to make any settlement or join in a settlement. They actually refused to contribute anything to the settlement by way of payment of any sum of money to the plaintiffs. It was not asked and it was never given an opportunity to state on the record or off the record, so far as I know, whether the amount of the settlement or whether the settlement was reasonable and it is clear that National Cargo Bureau was, or put it another way, that the defendants Hyman-Michaels and Michigan Foundry did not tender the defense in this case to National Cargo Bureau.

In weighing these conflicting—I don't think it's quite correct that I say weighing the conflicting principles—but weighing the policy of the desirability of settling lawsuits against the right of a third-party defendant to assert defenses; on the state of this record I hold that it is encumbent upon the defendants in pursuing their claims of indemnity against National Cargo Bureau under the third-party complaint to prove actual liability on the part of the defendants to the plaintiffs and not a mere potential liability.

Now one thing that has occurred to me and I don't believe was argued at any time during the several arguments that took place on this issue, is that the plaintiffs here were asserting a right of recovery against the defendants on several theories. Now one of those theories was that the defendant Hyman-Michaels had not delivered to the plaintiffs the material contracted for. In other words, it contained foreign matter, debris and in effect was not clean steel turnings.

Now that is one of the claims of the plaintiffs, asserted by the plaintiffs against Hyman-Michaels and I think the

plaintiffs also were relying on a third-party beneficiary, contract of the same nature against Michigan Foundry in the sale of this cargo material by Michigan Foundry to Hyman-Michaels.

The plaintiffs are also asserting other theories in support of its claim against both of these defendants.

Now, then, absent a stipulation in which there is a specific stipulation on which theory or with respect to the right of the plaintiffs to recover against either defendant here on the theory of the breach of contract or absent an answer to a special interrogatory by jury verdict, the third-party defendant, or the Court or jury trying this issue would have no way of knowing on what theory—or, put it this way: Whether the plaintiffs recovered on the breach of contract or on some other theory.

Now, if it was on the breach of contract, as I see it, there could clearly be no recovery over against National Cargo Bureau. In other words, if Michigan Foundry hadn't delivered to Hyman-Michaels the cargo that Mitsubishi contracted to buy on that third-party beneficiary claim by the plaintiffs against Michigan Foundry and if Hyman-Michaels didn't deliver the cargo which was the subject matter of the purchase of this material by Mitsubishi from Hyman-Michaels, then on that theory neither Hyman-Michaels nor Michigan Foundry could recover over against National Cargo Bureau. If there was some specific finding either by way of a stipulation in connection with a settlement between the parties, third-party defendant and the defendants here, or if there had been a specific answer or an answer to a specific interrogatory covering that feature, then that could be clarified, but where the settlement has been paid without a stipulation as to the other things I mentioned, as well as this breach of contract theory that I have talked about, I don't see how the jury or the Court would know on what basis or what theory the defendants

were relying in proceeding on the third-party complaint against National Cargo Bureau until that has been established by the evidence or by some agreement of the parties.

Now, this has not been discussed, so far as I recall. The right of indemnity, as I understand this matter, would—the right of Hyman-Michaels and Michigan Foundry to seek indemnity against National Cargo Bureau would depend upon whether there was a breach of some other claim made by the plaintiffs against the defendants; that is, a breach of, say, the warranty or implied warranty of loading, supervising the loading.

Now, I know this has been a very rambling decision and I apologize for it; but time just simply doesn't permit me to sit down and write it out as I would like to have done, but in support of this last point that I have made, in support of my ruling, I rely to some extent upon the case that was cited yesterday, and I don't know who cited it. It was Barber-Greene Company v. Bruning Company, 357 F. 2d (1966). I think Mr. Martin cited it, but that case also points out and deals, to some extent, with this specific point that I have just mentioned. One of the headnotes, and I will read from that because it summarizes quite a little of the Opinion, among other things it states:

"The liability of—"

Well, let me read first headnote 2.

"It is essential that the one sought to be held as an indemnitor be primarily responsible for negligence which caused injury; where the one responsible is duly notified of pendency of suit and full opportunity is afforded him to defend action, the judgment, if free of fraud and collusion, is conclusive against him."

Then the next headnote, headnote 3, reads as follows:

"The liability of alleged indemnitor, except in those instances where successive warranties or other

bases for responsibility are identical, remains to be proved in indemnity action and is not necessarily concluded by result of injured person's suit against the one claiming to be an indemnitee."

For these reasons, I hold that the defendants must establish actual liability on their part to the plaintiffs rather than potential liability in proceeding, under the third-party complaint, to establish indemnity against the third-party defendant National Cargo Bureau.

MR. VANDEVEER: Your Honor, for some time you have been mentioning a case by number, which is the cargo case.

THE COURT: Yes.

MR. VANDEVEER: I take it that this ruling, do I understand, applies to the ship cases, too?

THE COURT: It does.

MR. VANDEVEER: All right.

THE COURT: I am glad you mentioned that because I did have in mind, in my decision I was referring to the parties as they are structured in the jury case, but the decision applies equally to the non-jury cases.

(Tr. pp. 7387-7408, incl. October 30, 1968)

[Next Day]

THE COURT: I would like to place something on the record and then I will be glad to hear from you gentlemen.

In addition to what I said yesterday in ruling on the issue of whether the defendants, Hyman-Michaels and Michigan Foundry, will require to prove their actual liability to the plaintiffs, or whether they needed only to establish the reasonableness of their settlement with the plaintiffs, and having ruled that the defendants had to prove actual

liability, I feel I did not make some of my reasons as clear as I should have and therefore I would like to say further in support of my ruling that one of the elements of the causes of action asserted by the defendants, Hyman-Michaels and Michigan Foundry, in their third-party complaint against the National Cargo Bureau is the burden of proving a liability to the plaintiffs.

This burden may be discharged by proving actual liability or by giving notice to the National Cargo Bureau and an opportunity to defend, and a showing of the indemnitor's failure or refusal to defend. In our case, the alleged indemnitor, the National Cargo Bureau, is a party to these cases, and has elected to defend. The requirement of notice has been discharged by the mere filing of the third-party complaint and the trial of the issues under that third-party complaint, and under the other proceedings, but in my opinion yesterday from the bench, I do not recall, and I don't think I made it clear with respect to my reasons for emphasizing the failure of the defendants, Hyman-Michaels and Michigan Foundry, to offer their defenses to plaintiffs' claims to the National Cargo Bureau at the time, or prior to making the settlement with plaintiffs. In so doing, I had in mind the well established rule that an indemnitor cannot be bound by a judgment against the indemnitee without notice and opportunity to defend the original action.

In support of this rule, I would like to cite and quote briefly from 42 CJS at page 641 as follows:

> "Where the indemnitor is notified of the pendency of an action against the indemnitee in reference to the subject matter of the indemnitee and is given an opportunity to defend such action, the judgment in such action, if obtained without fraud or collusion, is conclusive on the indemnitor as to all questions determined therein which are material to a recovery against him

in an action for indemnity brought by an indemnitee; and it is not open to collateral attack by the indemnitor, and the judgment is conclusive against the indemnitor whether or not he appears and defends. This rule is in some jurisdictions embodied in statutory provisions, and is sometimes expressly prescribed by an indemnity contract; but it exists entirely apart from any agreement making the judgment conclusive."

I also would like to cite the case that I previously cited yesterday in giving my ruling, the case of Jennings v. United States, a Fourth Circuit case decided in 1967 and reported in 374 F. 2d 983, where the Court, speaking to Circuit Judge Sobeloff at page 985 and six said:

"The concept that notice plus an opportunity to defend render binding on an indemnitor the judgment in a case in which he did not participate springs from notions of res judicata. The reasoning is that where an indemnitor is notified and can take part in—indeed may control—the litigation, he is precluded from contesting the indemnitee's liability in the subsequent indemnity action. The indemnitor's knowing failure to participate is deemed a consent to representation by the indemnitee, thus forming the predicate for application of the rule that a litigant is entitled only once to his day in court. Lack of notice, however, destroys the consensual element, vitiates the binding effect of the judgment, and entitles the indemnitor to be heard on the issue of the indemnitee's liability. The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements."

In my opinion, to bar the alleged indemnitor, National Cargo Bureau, at this stage of the proceedings, and in view of what all that has occurred, to bar National Cargo Bureau now from offering such defenses makes the requirement of notice and an opportunity to defend meaningless. That is all I care to add to what I said yesterday in support of my ruling.

(Tr. pp. 7421-7425, incl. October 31, 1968)

EXCERPT FROM BRIEF IN U. S. COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ARGUMENT.

[19]

No. 20,126

III.

Under the circumstances and evidence in this case, was the action of the Captain in applying water to the turnings following the sailing of the ship from Montreal on or about July 3 an independent intervening cause?

The District Court has held that the breach of a contractually assumed duty by NCB at Muskegon was not causally related to the fire damage at Philadelphia. In doing so, it viewed this indemnity action as if it was an action founded upon a Tort. It is not, and Tort principles of superseding cause are not applicable.

Assuming, *arguendo* only, that the superseding cause concept would nevertheless apply, the court below was wrong.

The criteria for superseding cause must first be examined. An intervening act which is a normal response to a situation created by antecedent negligent conduct is not a superseding cause. *Restatement, Torts,* § 443. See *Wilson v. Goscinske,* 233 F. 2d 759 at 761, where this Court said:

> "It has long been settled doctrine that a chain of causation is not broken by an intervening act which is a normal reaction to the stimulus of a situation created by negligence."

C

Normal efforts to avert a threatened harm is not a superseding cause which will insulate the antecedent negligent conduct of an actor. *Restatement, Torts,* § 445. An intervening act, even though negligent, is *not* a superseding cause if the original actor should have realized that

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1857

HYMAN-MICHAELS COMPANY and
LAKES SHIPPING & TRADING COMPANY
Petitioners,

v.

NATIONAL CARGO BUREAU, INC.,
Respondent.

No. 1897

HYMAN-MICHAELS COMPANY,
Petitioner,

v.

NATIONAL CARGO BUREAU, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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EXPLANATION—REFERENCE GUIDE

In Respondent's Brief there are page references to:

1. The trial transcript which are designated as (R);

2. The Joint Appendix, filed in the Circuit Court of Appeals which are designated as (a);

3. The Supplemental Appendix attached to Appellee's Brief, filed in the Circuit Court of Appeals, which are designated as (c);

4. The Appendix attached to the Petition for Writ of Certiorari which are designated as (aa).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1837

HYMAN-MICHAELS COMPANY and
LAKES SHIPPING & TRADING COMPANY
Petitioners,

v.

NATIONAL CARGO BUREAU, INC.,
Respondent.

No. 1837

HYMAN-MICHAELS COMPANY,
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NATIONAL CARGO BUREAU, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHEN A DEFENDANT VOLUNTARILY SETTLES PLAINTIFF'S CLAIM DURING TRIAL, WITHOUT, AT THE TIME OF SETTLEMENT, FIRST OFFERING THE THIRD PARTY DEFENDANT THE OPPORTUNITY TO TAKE OVER DEFENSES, DOES THIRD PARTY PLAINTIFF HAVE THE BURDEN OF PROVING THAT HE WAS ACTUALLY LIABLE TO THE PLAINTIFF AS A CONDITION PRECEDENT TO ESTABLISHING A RIGHT OF INDEMNITY AGAINST THE THIRD PARTY DEFENDANT?[1]

II.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE FINDINGS OF FACT MADE BY THE DISTRICT COURT WERE NOT CLEARLY ERRONEOUS AND SUPPORTED THE CONCLUSION (phrased in contract terms) THAT NATIONAL CARGO WAS NOT LIABLE FOR ITS BREACH OF CONTRACT BECAUSE THE INJURY TO THE SHIP AND ITS CARGO WAS UNFORESEEABLE?[2]

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[1] This question relates only to the jury case because in the Judge-tried case the District Judge found N.C.B. not liable for other reasons.

[2] This question would not apply to the jury case; its significance, if any, would be in connection with the Judge-tried case.

STATEMENT OF THE CASE

For the purpose of consideration of this Petition, and excepting as hereinafter indicated, Respondent, National Cargo Bureau (hereinafter referred to as N.C.B.) accepts Petitioner's Statement of the case.

EXCEPTIONS:

1. The 130° F referred to in 46 C.F.R. 146.27-100 is advisory and refers to the temperature of turnings on the dock and not aboard the ship (R 8617, 8618, 8619, 8621).

2. The Coast Guard Regulations were complied with. (61aa).

3. While the Gyda was in Detroit and in Montreal, the Shipowner and Petitioner employed experts (not N.C.B.) to advise concerning the cargo heating. (141a, 155a, 158a, 159a, 169a, 228a, 229a, 185a, 188a, 189a).

4. Temperatures moderated while the vessel was in Detroit. (58aa).

5. Damage to the ship in Montreal was slight. (191a).

6. The District Judge held that the N.C.B.-Hyman contract related to activities in Muskegon only. (39aa).

7. The District Judge also held that the N.C.B. was not liable for the breach of its contract in Muskegon, because the damage (expressed in contract terms) was not reasonably foreseeable, on account of all the occurrences between 6-18 and 7-14-61 while the ship (Gyda) was enroute from Muskegon to Philadelphia. (58aa, 59aa).

REASONS FOR NOT GRANTING THE WRITS

I.

THERE IS NO REAL OR EMBARRASSING CONFLICT OF OPINION AND AUTHORITY BETWEEN THE CIRCUIT COURTS OF APPEAL.

Petitioner opens its argument by stating:

> "The various Courts of Appeal are at hopeless odds as to the requirements which must be met by an indemnitor proceeding on a theory of indemnity based upon a contract." (Petition for Writ, at p. 10).

Petitioner concludes its argument by stating:

> "One Court of Appeals has now written an entirely new condition into what had heretofore been accepted law, given, of course, notice and the opportunity to defend. The point needs clarification". (Petition for Writ, at p. 17).

Respondent does not believe either of these statements are correct. Respondent does not believe there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. Such a conflict is a condition precedent to the granting of the Writ. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S Ct. 422, 423, 67 L Ed 712; F.R.C.P. 19(b).

Petitioner contends that the law in several Circuits is different than the law enunciated by the Sixth Circuit in 406 F. 2d 1039 (14aa), and Petitioner cites ten cases in

support of its contention.[3] Respondent respectfully submits that these cases are not in conflict with the Sixth Circuit's ruling. The several cases cited by Petitioner are distinguishable.

Waterman v. *Dugan*, 364 U.S. 421 didn't deal with the necessity of defense tender. It dealt with the necessity of a direct contractual relationship between the shipowner and the stevedore and rules that such a relationship was not necessary. The holding is not in conflict with the Sixth Circuit Court of Appeals holding in 406 F. 2d 1039. (14aa).

Rederi A/B Dalen v. *Maker*, 303 F 2d 565 (C.C.A. 4) involved a situation where the third party defendant stevedore, during trial, settled with the plaintiff and then sought to avoid indemnity for attorney fees. The Sixth Circuit was dealing with an entirely different situation in 406 F 2d 1039. (14aa).

Jennings v. *U.S.* 374 F 2d 983 does not support Petitioner's position but rather Respondent's position, and the Sixth Circuit Court of Appeals so held. (21aa, 22aa)

> "The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and *an opportunity to defend* are the indispensable due process satisfying elements". (374 F. 2d at 986) (emphasis added)

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[3] *Dramanti* v. *A/S Inger*, 314 F 2d 395 (C.C.A. 2, 1963), cert denied 375 US 834; *West Coast Terminals Co. of Calif.* v *Luchenbach SS Co.*, 349 F 2d 568 (C.C.A. 9, 1965); *California Stevedore & Ballast Co.* v. *Pan-Atlantic Steamship Cor.*, 291 F 2d,, 252 (C.C.A. 9, 1961); *Chicago R.I. and P.R. Co.* v. *Dobry Flour Mills*, 211 F 2d 785 (C.C.A. 10, 1954), cert. denied 348 U.S. 382; *Jennings* v. *U.S.* 374 F 2d, 983 (C.C.A. 4, 1967); *St. Louis Dressed Beef Co.* v. *Maryland Casualty Co.*, 201 U.S. 173; *Chicago* v. *Robbins*, 67 U.S. 418; *Waterman Steamship Co.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421; *Rederi A/B Dalen* v. *Maker* 303 F 2d 565 (C.C.A. 4, 1962); *Moses-Ecco Co.* v. *Roscoe-Ajax Corp.*, 320 F 2d 685 (1963).

The other cases cited by Petitioner are not applicable and were distinguished by the Court of Appeals either because the third party was tendered the defense and refused it (22aa); or because the claim for indemnification was founded on a judgment and actual liability had been established (22aa); or because the defendant's claim against the third party was founded upon a written contract of insurance or indemnification where the insurance company or indemnitor agreed to defend or to pay damage claims against another (22aa).

The Court of Appeals was correct in holding that the general rule is that an idemnitee must show actual liability to recover against the indemnitor (21aa)[4], and that there was no reason for departing from this rule because Hyman had not tendered the defense, and by so doing had not afforded N.C.B. the opportunity of asserting Hyman's defense to the plaintiff's action as provided for by F.R.C.P. 14 (24aa). The inconvenience that might be caused in requiring tender is not sufficient to deprive Respondent of its rights under F.R.C.P. 14.

II

THERE IS NO MATTER OF GENUINE PUBLIC INTEREST AT STAKE; PETITIONER MAKES NO CLAIM THAT FINDINGS OF FACT WERE CLEARLY ERRONEOUS; PETITIONER SIMPLY DISAGREES WITH THE FINDINGS OF FACT MADE BY THE DISTRICT COURT WHICH WERE AFFIRMED BY THE COURT OF APPEALS.

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[4] The Toledo, 122 F. 2d 255 (2nd Cir.), cert. denied, *Isbrandtsen-Moller Co.* v. *The Toledo*, 314 U.S. 689, 62 S. Ct. 302, 86 L. Ed. 55 (1941); *Jennings* v. *United States*, 374 F. 2d 983 (4th Cir. 1967); *Nelson* v. *Sponberg*, 51 Wash. 2d 371, 318 P. 2d 951 (1957); *Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N.Y. 214, 67 N.E. 439 (1903); *Donald* v. *Guy*, 127 F. 228 (E. D. Va. 1903).

Petitioner does not state a reason to support the granting of a Writ. Petitioner does not demonstrate how a matter of public interest is involved. Petitioner does not contend that the conclusions of law and/or fact are clearly erroneous.

Petitioner is simply voicing disagreement with the District Court's and the Appeal Court's interpretation of the evidence so as to conclude that N.C.B. was not liable for breach of its contract because the damage was not reasonably foreseeable. The evidence showed that the damage was remote in time and space from the breach and that there were a number of intervening events, besides the Captain's applying water to the cargo. (7aa, 10aa, 11aa, 58aa, 59aa).

Petitioner should be estopped from criticizing the District Court's terminology because Petitioner actively contributed to the District Judge's use of this language, (11aa) for instance, by submitting Requests to Charge which used the terms "proximate cause". (368c, 369c, 370c).

Further, the selection of technically incorrect language ("proximate cause" rather than "unforeseeable") by the District Court is not a reason for reversal or remand because if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208; *United States* v. *American Ry. Express Co.*, 265 U.S. 425; *United States* v. *Holt State Bank*, 270 U.S. 49, 56; *Langnes* v. *Green*, 282 U.S. 531; *Stelos Co.* v. *Hosiery Motor-Mend Corporation*, 295 U.S. 237, 239; cf. *United States* v. *Williams*, 278 U.S. 255; *Helvering* v. *Gowan*, 302 U.S. 238; *Riley Co.* v. *Commissioner*, 311 U.S. 55.

CONCLUSION

Examination of the cases relied upon by Petitioner will demonstrate that there is not an embarrassing conflict between the Circuit Courts of Appeal.

Petitioner's Reason II is not a valid reason for granting of the Writ, because a matter of public interest is not involved; and because the findings below are not clearly erroneous; and because the giving of a wrong reason for a correct result is not a basis for reversal or remand.

Respectfully submitted,
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